IN THE

Supreme Court of the United States.

OCTOBER TERM—1926.

No. 180.

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs-Appellants,

—against—

HOWARD SUTHERLAND, as Alien Property Custodian of the United States; FRANK WHITE, as Treasurer of the United States; and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF APPELLANTS.

Report of Opinions Below.

The opinion of the Circuit Court of Appeals, for the Second Circuit, is reported under the title of *Zimmer-*

mann, et al. v. *Hicks, et al.*, 7 Fed. (2nd) 443. The opinion of the United States District Court, for the Southern District of New York, is reported under the title of *Zimmermann, et al.* v. *Miller*, 2 Fed. (2nd) 629. Between the rendering of the opinion of the District Court and the handing down of the opinion of the Circuit Court, Thomas W. Miller ceased to be Alien Property Custodian and Frederick C. Hicks, as Alien Property Custodian, was substituted in his place as a party in this cause. During the pending of this appeal Frederick C. Hicks ceased to be Alien Property Custodian and Howard Sutherland, present Alien Property Custodian, was substituted in his place as a party appellee.

The Jurisdiction of This Court.

The judgment to be reviewed is a final judgment of the United States Circuit Court of Appeals, dated May 11, 1925, reversing the decree of the United States District Court, for the Southern District of New York (R. 132).

The cause is in the Supreme Court by virtue of an order, granted on May 26, 1925, allowing the plaintiffs' petition for appeal (R. 133). The plaintiffs in the District Court will, for clarity, be referred to in this brief as plaintiffs and the defendants in that Court will, for the same reason, be referred to here as defendants.

The statutory provisions under which the jurisdiction of the Supreme Court is invoked are found in Section 240 of the Judicial Code, as it stood on May 11, 1925, the date of the filing of the judgment below (36 Stat. L. 1157).

Statement of the Case.

This suit was brought by the plaintiffs under Section 9 of the Trading with the Enemy Act to establish a debt owing to them by the defendant Wiener Bank-Verein. The case came on for trial before Honorable John C. Knox, District Judge, who on June 24, 1924, rendered a decree in favor of plaintiffs and against the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein to the effect that the said Wiener Bank-Verein was indebted to the plaintiffs in the sum of $50,919.97, being 2,063,799.03 kronen converted into United States currency at the August 12, 1919, rate of exchange.

All of the parties to the suit appealed to the United States Circuit Court, for the Second Circuit, the plaintiffs appealing on the ground that the rate of exchange at which the said debt of 2,063,799.03 kronen should be converted into United States currency is the pre-war rate of exchange as it existed for the month prior to April 6, 1917, that is, 11.18 cents per krone, which would amount to $230,732.73, with interest thereon from April 6, 1917. The Circuit Court reversed the decree of the District Court and in effect dismissed the bill of complaint.

The Pleadings.

The bill of complaint, as amended by stipulation, after alleging the formal facts of the plaintiffs' partnership, and the capacity in which the various defendants are sued, further alleges that the suit is brought in equity under the provisions of the Trading with the Enemy

Act; that certain property was conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him or by the Treasurer of the United States on the ground that it was the property of the defendant Wiener Bank-Verein, which was an "enemy" or "ally of enemy"; that the proceeds of the said property continued to remain with the Alien Property Custodian and/or the Treasurer of the United States; that on or about April 6, 1917, the defendant Wiener Bank-Verein was indebted to the plaintiffs in the sum of 2,063,799.03 kronen; that said sum was due and owing on April 6, 1917, and is now due and owing at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917, that is, at the rate of 11.18 cents for each Austrian krone, namely, $230,732.73, which sum the defendant bank retains and although demanded, refuses to pay; that on or about March 25, 1919, and December 15, 1921, the plaintiffs duly filed notices of their claim for this amount with the Alien Property Custodian and that the property is subject to any decree which may be rendered in this suit (R. 13-21).

The relief for which the plaintiffs pray is that the Alien Property Custodian or the Treasurer of the United States, as the case may be, be directed and ordered to pay to the plaintiffs, the sum of $230,732.73 with interest from the 6th day of April, 1917, out of any property and the income thereon which the Alien Property Custodian or the Treasurer of the United States has in his possession, and which was taken over as belonging to the defendant bank.

The answer of the Wiener Bank-Verein admits the allegations of the bill of complaint relating to the deposit

and the seizure by the Alien Property Custodian, as well as the formal allegations. It denies that the deposit was due and owing to the plaintiffs at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917; it denies the amount in dollars which the plaintiffs claim is due to them and it denies any knowledge or information sufficient to form a belief as to the jurisdiction of the Court (R. 28-29).

It then proceeds to set forth as a first defense, that an agreement between the plaintiffs and the defendant Wiener Bank-Verein, on which their mutual relations were based, provided that the law of Austria should apply; that prior to the time when their relations began, the Austrian law provided that where a debt could not be paid because the creditor was unknown, absent or dissatisfied with the offer made, the debtor might deposit the subject-matter of the debt in court, notify his creditor of his action and thereupon become discharged of the debt; that the plaintiffs after April 6, 1917, and prior to the commencement of this suit refused to accept the return of the sum in kronen at the then prevailing rate; that thereupon the defendant Wiener Bank-Verein deposited these kronen with the local law court designated for that purpose and gave written notice of such deposit to the plaintiffs; and that by reason thereof, it became discharged and released of the debt (R. 30 31).

It also sets up a second defense, to the effect that the plaintiffs established this kronen account with the defendant Wiener Bank-Verein for the purpose of having a balance with the Wiener Bank-Verein against which the plaintiffs could sell drafts, checks and make cable and wireless transfers for the benefit of their customers;

that under such a system of banking the settlements are always made at the prevailing rate at the date of payment or settlement; that this system of international banking usage was well known both to the plaintiffs and to the defendant and that they contracted with respect to it; and that, therefore, if the plaintiffs are entitled to recover at all from the Wiener Bank-Verein, they are only entitled to recover at the rate of exchange prevailing at the date of the rendition of the judgment (R. 31-33).

The answer prays for alternative relief, namely, a dismissal of the bill of complaint upon the ground that the Wiener Bank-Verein was discharged by the payment into the Austrian Court, or that the plaintiffs receive judgment for the sum sued for, expressed in American dollars at the rate of exchange prevailing at the date of the rendition of the judgment.

The allegations of the answer of defendants Miller and White are not set forth here because there is a complete failure of proof in this regard, these defendants offering no proof at the trial.

The Facts.

The evidence before the trial Court consisted partly of oral testimony and partly of stipulations of fact made for the purposes of the suit. The facts, briefly stated, are as follows:

Plaintiffs were a long established New York firm, composed entirely of American citizens, and were brokers and bankers engaged in general brokerage, stock exchange and foreign exchange business. They specialized extensively in foreign exchange and foreign moneys (R. 95-97).

The defendant Wiener Bank-Verein is one of the large banking institutions in Vienna (R. 97-98). It is a foreign corporation, organized under the laws of the Empire of Austria-Hungary, under which it originally received its corporate charter, which has since been validated by the new government. Its principal place of business is in Vienna, Austria, and it has no branch office in the United States (R. 35-36). However, both prior and subsequent to the outbreak of war between the United States and Austria-Hungary, the defendant bank had an agent or financial representative in New York City (R. 103). The plaintiffs began their dealings with the Wiener Bank-Verein a number of years before the outbreak of the war between the United States and Austria. They maintained an account with the Wiener Bank-Verein in kronen. That account they replenished from time to time, as necessity arose, by further deposits in kronen. This kronen deposit was used by them to draw on when they made sales of kronen exchange or when they drew drafts or issued orders by letter, cable or wireless for the payment of kronen sums (R. 36).

During the time that the plaintiffs and the defendant Wiener Bank-Verein had these dealings, the Wiener Bank-Verein rendered periodic statements of account to the plaintiffs at least once in three months. These statements of account were rendered on certain printed sheets which are in German. A translation approved by counsel appears as Defendant's Exhibit A (R. 39-45). The relevant figures for each statement of account were inserted in the appropriate blank spaces which appear in the fac-simile. The plaintiffs were credited thereon with interest at 2½ per cent. from the date of any such statement.

The defendant bank enclosed with its periodical statements of account a blank to be signed by the plaintiffs and returned to the defendant, acknowledging the correctness of the account as stated. Also, the conditions annexed to the account as stated provided that unless claims were made within a specified time for errors in the account, the accounts would be considered to be accepted and found to be correct. Furthermore, it should be noted that the conditions attached to the statement of account were not apparently included in the original contract under which the deposit was effected.

A state of war was declared to exist between the United States and Austria-Hungary on the 7th of December, 1917. Communications between the parties were, of course, suspended during the period of hostilities and afterwards, until July 14, 1919, when communications between American and Austrian nationals again became permissible under general license of the War Trade Board of the United States.

The statements above referred to, letters of the defendant Wiener Bank-Verein, and stipulations of their counsel in this case, all show that the Wiener Bank-Verein was indebted to the plaintiffs, as of April 6, 1917, in the sum of 3,313,799.03 kronen (Plaintiffs' Exhibit 1, R. 111; Answer, par. III, R. 29; Stipulation dated December 5, 1923, par. VI, R. 37-38; Stipulation dated December 18, 1923, R. 47). However, of this sum the plaintiffs in this action only seek the amount of 2,063,799.03 kronen. The difference between these two sums represents a credit of 1,250,000 kronen due the defendant bank because of a purchase of kronen made by the plaintiffs from the New York representative of the defendant. This purchase was cancelled because the credit was not properly established and the amount

thereof, which was included (R. 99-100) in the amount stated to be due by the Wiener Bank-Verein, has been deducted from the account as stated by the Wiener Bank-Verein.

After free communication was restored on July 14, 1919, the plaintiffs demanded their balance as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month between November 7 and December 7, 1917, that is, at the rate of 11.18 cents for each Austrian krone (R. 37). On August 6, 1919, they sent the Wiener Bank-Verein the following cable (R. 109-110):

> "Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen STOP if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you STOP this will obviate lawsuit which we otherwise will be compelled to institute."

The Wiener Bank-Verein disputed the right of the plaintiffs to exact such a rate of exchange, and on or about April 1, 1920, it deposited in the Circuit Court of Vienna the number of kronen stated to be due and owing to the plaintiffs as of April 6, 1917 (R. 37-38). Thereafter the Wiener Bank-Verein wrote to the plaintiffs, giving them notice of the deposit (R. 38).

On the resumption of intercourse between the United States and Austria in 1919 plaintiffs forwarded new remittances to the defendant Wiener Bank Verein for the

purpose of protecting the pre-war orders which were in the mail at the outbreak of hostilities. It is apparent from reading Plaintiffs' Exhibit 1 (R. 108-113), which was a letter addressed to the plaintiffs by the defendant bank under date of April 1, 1920, that plaintiffs assumed that their pre-war balance was tied up as a result of war measures adopted by Austria and that it would be necessary to make new remittances for the protection of outstanding checks and drafts (R. 108-109). On reading the entire letter of April 1, 1920 (Plaintiffs' Exhibit 1), it is further apparent that the plaintiffs did not intend to ask the defendant bank to transform their old pre-war balance into new kronen, as claimed by the defendants. We submit that, when read in the light of the admitted fact that the plaintiffs had regarded the pre-war balance as already tied up by prohibitory regulations of Austria, and that upon learning that the defendant bank had exchanged the entire pre-war balance into new kronen the plaintiffs insisted on the re-establishment of the pre-war balance in old kronen, it is clear that the cable of August 15th, 1919 (R. 109), was not a direction to transfer the pre-war balance into new kronen.

Assignment of Errors.

The assigned errors which the plaintiffs intend to urge are as follows: That the Court erred,

First. In reversing the decree of the District Court of the United States, for the Southern District of New York, entered June 24, 1924, and in directing the dismissal of the bill of complaint herein.

Second. In holding that there had been no demand made by the plaintiffs, for the repayment of the indebt-

edness owed them by the defendant Wiener Bank-Verein, on August 6, 1919.

Third. In holding that plaintiffs cannot recover under Section 9 of the "Trading With the Enemy Act", unless the debt owing from the defendant to the plaintiffs was due and payable on October 1, 1917.

Fourth. In holding that until demand was made by plaintiffs, for the balance on deposit with defendant bank, said debt was not due and payable although it was owing to and owned by plaintiffs on October 6, 1917.

Fifth. In not holding that there is an account stated as of April 6, 1917, from defendant bank to plaintiffs.

Sixth. In not holding that there was a demand by reason of the notice of claim filed by plaintiffs with the Alien Property Custodian on March 25, 1919.

Seventh. In not holding that the contract of deposit was terminated and dissolved by the inception of the state of war between the United States and Austria-Hungary.

Eighth. In not holding that the contract was terminated and dissolved by the international legal rule of non-intercourse between alien enemies, the test of alien enemy character being commercial domicile.

Ninth. In not holding that the contract of deposit was terminated and dissolved by the provisions of the Trading With the Enemy Act of the United States, forbidding intercourse with an "enemy" or "ally of enemy".

Tenth. In not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States on or about April 6, 1917.

Eleventh. In not holding that the plaintiffs are entitled to interest on the amount of dollars specified in the 10th paragraph hereof at the rate of six per cent. per annum from April 6, 1917.

Twelfth. In not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of November and December, 1917.

Thirteenth. In not holding that plaintiffs are entitled to interest on the dollars specified in paragraph 12th hereof at the rate of five per cent. per annum from April 7, 1917.

Argument.

The plaintiffs submit that in a suit brought under Section 9 of the Trading With the Enemy Act, to recover from the Alien Property Custodian and the Treasurer of the United States, out of property taken over by them as belonging to a specific "enemy" or "ally of enemy", a debt owing to the plaintiffs by that "enemy" or "ally of enemy", the plaintiffs are entitled to recover the debt originally expressed in kronen at a pre-war rate of exchange and in addition interest thereon from the date

of the inception of the debt. In sustaining this contention they rely first, upon the provisions of the Trading With the Enemy Act as interpreted in the light of the common law, and second, upon the Treaty of Peace between Austria and the United States.

In dealing with this question plaintiffs contend that under the Trading With the Enemy Act and under the treaty, no actual demand upon the Austrian bank was necessary because:

A. *Aside from Treaty*:

1. There was an account stated from defendant bank to plaintiffs as of April 6, 1917.

2. The contract of deposit was terminated and dissolved by (a) the inception of a state of war between the United States and Austria-Hungary, (b) the international legal rule of non-intercourse between alien enemies, (c) the provisions of the Trading With the Enemy Act forbidding intercourse with an "enemy" or "ally of enemy".

3. There was a demand upon the Alien Property Custodian under the Trading With the Enemy Act in March, 1919.

B. *Under Treaty*:

1. Under the treaty plaintiffs are entitled to recover the kronen deposit owed calculated in dollars at a pre-war rate of exchange, together with interest thereon, because it was a debt, credit or account, and regardless of whether it was a debt actually demanded and immediately due.

In addition, plaintiffs claim that should this debt not be held to be payable at a pre-war rate of exchange it

should be payable at a rate of exchange as of August 6, 1919, because plaintiffs then actually demanded the sum owed of the defendant bank.

Also, plaintiffs contend that interest should be allowed on the principal amount from the due date.

In view of the defendant bank's reliance upon its deposit of depreciated kronen with an Austrian Court, plaintiffs contend that such deposit did not discharge the defendant bank from its obligation to the plaintiffs.

Finally, plaintiffs have set forth an analysis of the equities in the case.

POINT I.

Plaintiffs are entitled to sue under Section 9 of the Trading with the Enemy Act whether or not the debt sued on was actually due and payable prior to October 6, 1917.

This section of the act requires that for the maintenance of an action it is necessary only that there be a debt owned by and owing to the claimants prior to October 6, 1917. If these provisions are met the cause of action exists.

Section 9 of the Act has received interpretation by this Court in *Miller* v. *Robertson*, 266 U. S. 243. There Mr. Justice Butler, speaking for the Court, said in regard to the general interpretation which the Act is to receive, and particularly Section 9:

> "At the time of the passage of the Act, a large amount of property was owned and much business was carried on by alien enemies and their allies in this country. Congress determined that their

> property should be taken over and that trade with them should cease. The purpose was to weaken enemy countries by depriving their supporters of power to give aid. But the seizure of the money and property of the enemies and their allies would tend to hinder and might embarrass or ruin those having business transactions with them. *By the taking, the property seized would be put out of the reach of persons claiming it and beyond the power of creditors to attach it for debt.*" (Italics ours.)

It is apparent, therefore, that the Court recognized that one of the necessary effects of the Trading With the Enemy Act was to prevent American nationals, such as the plaintiffs here, from enforcing by attachment suit their right to collect a deposit, owing from an "enemy" bank. But for the provisions of the Trading With the Enemy Act, plaintiffs could unquestionably have brought a suit for the amount of the deposit indebtedness and could have attached the property of the defendant bank situated in this country. The Court, in effect, says that the Trading With the Enemy Act was not intended to penalize the American creditor by taking from him the right of attachment suit and other remedies without giving to him in lieu thereof some other means for the collection of his claim. The Court then goes on to say:

> "The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered (cites cases). The just purpose of the section is not to be defeated

by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations (cites cases).

Appellants contend that 'debt' as used in Section 9, is limited to its common law meaning. Undoubtedly, Congress intended to include causes of action which at common law were enforceable in an action of debt, such as those arising on bonds, notes, and other express promises to pay (citing cases) *quantum meruit*, and *quantum valebat* (citing cases).

The meaning of the word 'debt' as used in many statutes, is not restricted to demands enforceable in actions of debt."

The learned Justice then cites many examples of statutory construction in which the word "debt" is given a broad meaning, and continues:

> "There is nothing in the language of the Act or the reasons for its enactment to indicate a purpose to restrict the right to institute suits in equity as authorized in Section 9 to causes of action cognizable in debt under technical procedural rules. The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears (cites cases).
>
> We think it is immaterial whether plaintiff's cause of action is one for which an action of debt might be maintained. It would be unreasonable and contrary to the intention of Congress to exclude claims like that here in question, and we hold them to be included."

In *White* v. *Mechanics Securities Corporation*, 269 U. S. 283, decided by this Court on December 14, 1925,

the suits were brought under the Trading With the Enemy Act upon notes issued by the Imperial German Government and alleged to have been recognized by the present German Government. They sought to collect the amounts of the notes from funds alleged to have belonged to the Imperial German Government and taken over by the Alien Property Custodian. Mr. Justice Holmes delivered the opinion of the Court and said:

> "The elaborate argument that was made against the jurisdiction of courts over actions against foreign governments or to examine the conduct of such governments is beside the mark. In these cases no judgment is asked gainst Germany or against property that it is entitled to defend. The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an Act of Congress what shall be done with them, and that is the end of the matter. There is no question that such a seizure and disposition are within its powers. *Brown* v. *United States*, 8 Cranch, 110, 129, 3 L. Ed. 504, 510; *Miller* v. *United States* (*Page* v. *United States*), 11 Wall. 268, 20 L. Ed. 135. The treaty with Germany has recognized their effect. Article 1 according the rights asserted by the joint resolution of July 2, 1921, Sec. 5, recited in the treaty, 42 Stat. at L. 1939."

The exact nature of the notes sued on is not revealed by the opinion of this Court, but in the opinion of the Court of Appeals of the District of Columbia, the Court below, reported in 4 Fed. (2nd) 619, the Court said at page 620:

> "The notes were payable in American currency on April 1, 1917, five days prior to the declaration

> of war between the United States and Germany. Upon payment of interest in advance the maturity of the notes was extended to April 1, 1918."

And again, at page 621:

> "Section 9 of the Trading With the Enemy Act is a remedial measure, affording the method by which property wrongfully seized may be restored to its proper owner, or by which debts 'owing from an enemy or ally of enemy' may be recovered out of the property seized."

Concerning the instruments upon which these suits were brought, for eleven suits in all were heard in this appeal, the bill of complaint filed April 4, 1923 in the Supreme Court of the District of Columbia alleges as follows in paragraph 6:

> "That prior to October 6, 1917, the Imperial German Government owed to complainant the sum of Two Hundred and Fifty Thousand Dollars ($250,000) evidenced by 6% Treasury Notes of the par value of Forty Thousand Dollars ($40,000) dated May 6, 1916, and of the par value of Two Hundred and Ten Thousand Dollars ($210,000) dated May 24, 1916, all of said notes payable on April 1, 1917, known as Series 26; that Complainant purchased said notes for value long prior to the declaration of war between the United States and Germany and prior to October 6, 1917; and that said notes aggregating Two Hundred and Fifty Thousand Dollars ($250,000) constitute a debt within the meaning of the provisions of Section 9 of the Trading With the Enemy Act, as amended; that on or about March 14, 1917, the payment and maturity of these notes was extended

> to April 1, 1918 and interest thereon paid in advance to September 1, 1918; that thereafter, and on the 1st day of April, 1920, the amount of Eight Thousand Eighty-three dollars and Thirty-three cents ($8,083.33) was paid to Complainant out of funds which had been paid to the Alien Property Custodian as the property of the Imperial German Government, which said payment, being applied by Complainant on account of past due interest, paid said interest up to and including the 14th day of March, 1919."

It will thus be noted that the bill of complaint did not allege this debt was *due* prior to October 6, 1917, but merely that prior to that date the German Government *owed* to complainant the sum of Two Hundred and Fifty Thousand Dollars ($250,000), evidenced by 6% Treasury Notes due April 1, 1918.

The decrees affirmed by this Court in its above mentioned decision of December 14, 1925 were apparently not satisfied in full, for on April 12, 1926 the plaintiffs filed in the Supreme Court of the District of Columbia, a supplemental bill of complaint, the purpose of which, as set forth in paragraph 3 thereof, was

> "to obtain from this Honorable Court orders and/or decrees directing and requiring the defendants to fully satisfy the final decree heretofore entered in this cause, out of property and/or money seized by the Alien Property Gustodian and owing or belonging to, or held by, for, on account of or on behalf of, or for the benefit of the Imperial German Government or its successor government, the Republic of Germany, and now held by the defendants."

It appears from paragraph 7th of this supplemental bill that there remained unpaid on account of interest Sixty-nine Thousand, Forty-five Dollars and Fourteen Cents ($69,045.14) as provided in the final decree (Transcript of Record, Court of Appeals of the District of Columbia, April Term, 1926, No. 4495, filed July 15, 1926, printed September 16, 1926, page 2, folio 2, and page 3, folios 2 and 3).

It is clear, therefore, that the instruments sued on in this case were dollar notes and bonds which did not become due until after October 6, 1917. It also is clear that the defendants raised no objection in that suit on the ground that while the debt was owned by and owing to the claimants prior to October 6, 1917 it was not then due. It also is clear that none of the courts hearing this case considered that the fact that the debt was not actually due prior to October 6, 1917, was sufficient ground for dismissing the bill.

Giving the statute the interpretation indicated by this Court in the *Robertson* and the *Mechanics* cases above quoted, it would appear that the claim here is for a debt cognizable under Section 9 of the Trading With the Enemy Act. The ordinary meaning of the word "debt" is an obligation due or about to become due. In common parlance a sum due upon demand is a debt regardless of whether or not a demand has actually been made. There can be no dispute that according to the ordinary meaning of the words of the statute as this Court has directed them to be interpreted, the state of facts here shown gives a cause of action to the plaintiffs.

It is to be observed that the only limitation upon the language of the applicable subdivision of the section is:

"Nor in any event shall a debt be allowed

> under this section unless it was *owing to* and *owned* by the claimant prior to October 6, 1917" (Section 9 (e); italics ours.)

There is no provision that the debt must be actually due at that time. As a general rule of statutory construction it is held that the word "owing" in a statute means that a debt exists but not necessarily that it has become presently due and payable. We submit that the expressions of this Court in the *Robertson* case and in the *Mechanics* case indicate that this is the correct meaning to be given here.

It seems to us that the real question in this connection is whether the indebtedness is owing to and owned by the plaintiffs prior to October 6, 1917. If it was so owing to and owned by them, it is immaterial whether or not it was due.

POINT II.

The plaintiffs are entitled to recover of the defendants the value in dollars of the kronen deposit calculated at a pre-war rate of exchange.

A. Aside From Treaty Provisions.

A court sitting in the United States can only give a money judgment in dollars. If the obligation whose breach is the basis of the action is to pay in currency of a foreign country the value of that currency must be computed in dollars. The general sharp decline in value of many foreign currencies has made important the question of the date at which this rate of exchange is to be computed. This question has received careful

examination from the courts and while the cases are not agreed the rule that the rate of exchange prevailing at the time of breach is to be applied is supported by the great weight of authority. This is the law of England. *The Celia* v. *The Volturno* (1921), 2 A. C. 544, 20 A. L. R. 884—H. L. See also *Page* v. *Lerenson*, 281 Fed. 555, 558; *Dante* v. *Miniggio*, 298 Fed. 845; *Wichita Mill & E. Co.* v. *Naamlooze, etc., Industrie*, 3 F. (2nd) 931; *Hoppe* v. *Russo-Asiatic Bank*, 235 N. Y. 37, 39, affirming 200 App. Div. 460, 465; *Simonoff* v. *Granite City Nat. Bank*, 279 Ill. 248, 254; *Grunwald* v. *Freese* (Cal.), 34 Pac. 73, 76; *Manners* v. *Pearson & Son* (1898) 1 Ch. 581, 587-588, 592-593; *Societe des Hotels* v. *Cummings* (1921), 3 K. B. 459, 461 (reversed on another point (1922) 1 K. B. 451, 455, 463, 465); *Uliendahl* v. *Pankhurst Wright & Co.*, 39 Times L. R. 628; *Peyrac* v. *Wilkinson* (1924), 2 K. B. 166; *Barry* v. *van den Hurk* (1920), 2 K. B. 709, 712; *In re British American Continental Bank* (1922), 2 Ch. 589, 594-598.

This Court has applied the breach day-rule in *Birge-Forbes Co.* v. *Heye*, 251 U. S. 317; *Guinness* v. *Hicks*, 269 U. S. 71, and in *Sutherland* v. *Mayer*, 271 U. S. 272. It declined to follow this rule in *Deutsche Bank* v. *Humphrey*, decided November 23rd, 1926.

In both the *Guinness* case and the *Humphrey* case, *supra*, plaintiffs sued under Section 9 of the Trading With the Enemy Act to recover at a pre-war rate of exchange from property taken over by the Alien Property Custodian as belonging to the respective German defendants marks on deposit with German banks. In the *Guinness* case the debt matured by an account stated December 31, 1916. In the *Humphrey* case the debt

matured June 12, 1915 by reason of an oral demand upon the defendant bank. In both cases, therefore, the debt was due not only prior to the passage of the Trading With the Enemy Act but also prior to the inception of a state of war between the United States and Germany and prior to the severance of diplomatic relations between those countries.

The opinion of this Court in the *Humphrey* case reversed the decree below, which allowed a recovery at a pre-war rate of exchange, and held that there should be enforceable "no greater obligation than exists by that law (Law of Germany) at the moment when the suit is brought". The dissenting opinion in the *Humphrey* case is written squarely against the judgment day rule. It consequently is difficult to know whether in the *Humphrey* case the rate of exchange decreed to be applied is that of the date of the institution of suit or the date of the entry of one of the judgments.

In the dissenting opinion in the *Humphrey* case it is stated that the majority in that case rest upon the distinction that the debt upon which recovery there was sought was payable in Germany. In the majority opinion in that case it is stated:

> "In this case, unlike *Hicks* v. *Guinness,* 269 U. S. 71, at the date of the demand the German Bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose."

It consequently appears that the *Guinness* case was distinguished by this Court from the *Humphrey* case on the ground that in the *Guinness* case the debt was payable

in the United States, whereas, in the *Humphrey* case the debt was payable in Germany, and that this conclusion was based upon the fact that in the *Guinness* case at the date the cause of action arose the plaintiffs resided in the United States, whereas, in the *Humphrey* case at the date of demand the plaintiff was in Germany. The brief of the defendant bank in the *Humphrey* case stresses the fact that the plaintiff was not in the United States at the time the cause of action arose and also that the record failed to show that, at that time, there was any property of the defendant bank in this country.

A search of the record in the *Guinness* case reveals no ground for the conclusion that the debt was payable in the United States other than that since the plaintiffs, at the time the debt became due, were resident in the United States, the situs of the debt, being that of the creditors, was the United States. In the *Humphrey* case the demand was made orally upon the defendant bank by the plaintiff in Germany and consequently at the time the debt became due the situs of the debt, being that of the creditor, was Germany.

It therefore appears that the only ground of distinction between these cases is that in the Guinness case the situs of the plaintiffs, at the time the debt became due, was the United States, whereas, in the Humphrey case the situs of the plaintiff, at the time the debt became due, was Germany. In the instant case the plaintiffs were citizens and residents of the United States at the time the cause of action arose as well as for a long time theretofore and continually thereafter. Also, the record reveals that when the cause of action arose there was in the possession of the Alien Property Custodian property formerly belonging to the defendant bank. Both of these

statements are true whether it is considered that the cause of action arose because of an account stated, because of the inception of a state of war, because of the rule of non-intercourse between alien enemies, because of a demand upon the Alien Property Custodian or because of a demand upon the defendant bank. At all these times plaintiffs were resident and doing business within the United States, and there was within the United States property seized by the Custodian as belonging to the defendant bank. We submit that the instant case, therefore, falls squarely within the Guinness case on the question of applicability of the breach day rule.

Assuming, then, that the rate of exchange to be applied is that of the time of breach or time the cause of action arose, it only remains to find the date of the breach in the instant case. The sum sued for is a general bank deposit, as is admitted by the bank (R., 36). The relation was banker and depositor, including the relationship of debtor and creditor. The defendant bank at all times owed the amount on deposit.

I. An Account Was Stated as of April 6, 1917.

When the *Guinness* case came before this Court it was held that the indebtedness owing from the "enemy" to citizens of the United States should be computed at the rate of exchange prevailing at the time of the breach, or at the time the cause of action arose. In that case there was an account stated as of January 1, 1916, this being done by letter dated January 6, 1920. In the case at bar there was an account stated as of April 6, 1917, this being done by letter dated April 1, 1920 (Plaintiffs' Exhibit 1, R., 111). That the amount of kronen sued for in the

amended complaint at the pre-war rate is less by 1,250,000 kronen than the amount stated to be due and owing as of April 6, 1917, is immaterial. It is due to the allowance of a credit by the plaintiffs in the amount of 1,250,000 kronen against the amount so stated to be due by the Wiener Bank-Verein. To hold the contrary would mean that the defendant bank can escape the legal consequences of its account stated by impeaching its own statement, to show the amount owed was less than it stated.

The language of the letter from defendant bank to plaintiffs, dated April 1, 1920, is as follows:

> "* * * we have made up our mind to comply with your wishes in such a way as to take the amount of your pre-war balance held with us as per April 6th, 1917, viz., K.3,313,799.03 * * *" (R., 111).

The answer of the defendant bank also admits this obligation at paragraph III. It reads in part:

> "III. This defendant admits that on or about April 6th, 1917, the plaintiffs had on deposit with this defendant, a kronen balance amounting to 3,313,799.03 kronen * * *" (R., 29).

In the stipulation dated December 5, 1923, the defendant bank also admits the account stated in these words:

> "6. On or about the 1st day of April, 1920, the defendant, the Wiener Bank-Verein, deposited in the Circuit Court for the Interior at Vienna, in Part 6 thereof, the number of kronen in its bank stated to be due and owing to the plaintiffs as of April 6, 1917" (R., 37-38).

Further, in the stipulation dated December 18, 1923, the defendant bank again admits the account stated, in these words:

> "The deposit made in the Circuit Court of Vienna, Part VI, on April 1, 1920, of the number of kronen in defendant bank stated to be due and owing to the plaintiffs as of April 6, 1917, included a further sum of kronen sufficient to equal two and one-half per cent. per annum interest down to April 1, 1920, the date of such deposit, on the amount stated to be due and owing to plaintiffs as of April 6, 1917" (R., 47).

Thus it specifically appears that the Wiener Bank-Verein allowed interest on the amounts of these accounts stated at two and one-half per cent. up to the time of its depositing the kronen with the Circuit Court at Vienna. We submit that nothing could more clearly demonstrate their understanding that the effect of the statement of the account was to create a new obligation, immediately due, upon which interest would accrue. Whether or not they allowed the rate of interest to which the plaintiffs are entitled as a matter of law is immaterial. They did concede that the debt was due as of April 6, 1917, and that interest should be paid by them for the use of the money up to the time that they paid it over into the hands of the Austrian court. It would be difficult to imagine a clearer case of an account stated, with all the rights and privileges flowing out of it.

The defendants have heretofore claimed that in the case of bank deposits a demand is necessary to make the deposit due even after an account has been stated between the parties. The decision of this Court in the

case of *Guinness* v. *Hicks, supra*, is, we submit, final on that point.

II. THE CONTRACT BETWEEN THE PLAINTIFFS AND THE DEFENDANT BANK WAS TERMINATED AND DISSOLVED BY THE INCEPTION OF A STATE OF WAR BETWEEN THE UNITED STATES AND AUSTRIA, AT WHICH TIME THE RIGHT ACCRUED TO THE PLAINTIFFS TO RECOVER THE DEPOSIT IN AN ACTION FOR MONEY HAD AND RECEIVED.

a. Prior to the outbreak of war the contract in suit was executory; the doctrine of Hanger v. *Abbott does not apply.*

The Circuit Court of Appeals, in its opinion below, summarily dismissed this point in the following language (R. 130):

> "* * * that war does not affect the relations of parties to an *executed* contract, but merely suspends the remedies available thereunder, was fully held in *Hanger* v. *Abbott*, 6 Wall. 532." (Italics ours.)

The learned Circuit Court of Appeals is, as a general proposition, correct in its statement of the law formulated by *Hanger* v. *Abbott*, but, it is submitted, that case has no application to a contract such as is here under consideration. In the *Hanger* case a debt had become due and owing from a resident of the Confederacy (Arkansas) to residents of the United States (New Hampshire) prior to the outbreak of the Civil War. The creditor had fully performed; nothing remained to be done on the part of the debtor except to pay a liquidated sum of money. His obligation has been aptly termed a "unilateral debt".

The Court held specifically that the operation of the Statute of Limitations was suspended during the continuance of the war, and, more generally, that the remedy of such an obligation had been *suspended* by the outbreak of war and revived at its termination.

The inapplication of the *Hanger* case to the contract now before the Court becomes apparent when the nature of this contract is fully considered. The contract between the plaintiffs and the defendant bank was not at the time of the declaration of war an executed contract in any proper use of the term. Not only is the agreement *executory* as opposed to any accepted use of the word *executed*, but it is wholly different in kind and in effect from those obligations wherein the courts have held that the remedy only is affected by the existence of a state of war between the countries of residence of the respective parties. But for the statement of the Circuit Court of Appeals quoted above, it would seem axiomatic that if the parties to a contract have bound themselves to do, or to refrain from doing, certain things in the future, the contract remains *executory* until the obligations are fully performed.

See:

Farrington v. *Tennessee*, 95 U. S. 679, at 683;
Fletcher v. *Peck*, 6 Cranch. 87, at 136.

It is submitted that the contract before the Court must fall within the category of executory obligations. The contract is one of deposit in a bank. The relation created between the parties was that of banker and depositor with all of the mutual undertakings and obligations therein involved. To call the relation merely that of debtor and creditor and then, seeing merely the debt,

to apply the doctrine of *Hanger* v. *Abbott,* is to regard only one element of the contract and to disregard the balance of the essential characteristics of the relationship by which continued mutual duties were created.

The nature of the account between the parties is admittedly accurately described as follows (R. 36):

> "For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank-Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant, Wiener Bank-Verein, at Vienna."

It was essential for the proper conduct of the plaintiffs' business that they use the services offered by a foreign banking house. The purpose of the account was to have funds readily available against which payees of the plaintiffs might cash their written orders, and from which cable and wireless transfer orders of the plaintiffs would be honored. The account, in order to effectuate this purpose, must have been available and subject to the plaintiffs' orders and instructions at all times. The money deposited was not a bailment; not a deposit for safe-keeping; not a deposit for a separate purpose. It was to be used for current business and was so used practically up to the declaration of war between Germany and the United States, making Austria-Hungary an ally of enemy, at which time there still remained to be performed all the mutual undertakings by each party

necessary to the continuation of the relationship. These mutual undertakings were, in the contemplation of the parties, to be carried on in the future as in the past. Certainly, the agreement, at the instant before the declaration of war, was not fully performed on either side; certainly not executed; certainly more remained to be done on the part of the bank than to pay to the plaintiffs a sum of money then due and owing; certainly more existed than a unilateral debt. It is submitted that the doctrine of *Hanger* v. *Abbott* has no application. Indeed, far from being an authority that the contract now before the Court was merely suspended by reason of the war, that case contains strong *dictum* supporting the proposition that the contract was totally abrogated. It is said at page 536:

> "Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an Act of Congress."

b. An executory contract such as that before the Court, between nationals of enemy countries, resident within their respective countries, is terminated by the outbreak of war.

By virtue of principles of International Law, by statute, and by accepted rules of common law, this contract is terminated. The doctrine in the United States may be stated as follows: An executory contract concluded before the outbreak of war between enemies "divided by the line of war" is terminated and dissolved by the outbreak of war (1) if it inures to the aid of the

enemy, or, (2) if it is in its nature incapable of suspension. A contract will in its nature be incapable of suspension (a) if its proper performance necessitates intercourse with the enemy during the war, or, (b) where the parties cannot on conclusion of peace be made equal, since the doctrine of revival of contracts suspended by war is based on considerations of equity and justice.

As to the termination of contracts inuring to the aid of the enemy nothing need be said; the soundness of the doctrine is self-evident.

Contracts, the performance of which requires intercourse with the enemy, are terminated by the outbreak of war.

There is no rule of International Law more universally acknowledged and adopted than the rule of non-intercourse between alien enemies, the test of enemy character being commercial domicile. This doctrine has been law in the United States since the cases of *The Venus* (1814), 8 Cranch. 253, and *The Harmony* (1800), 2 C. Rob. 322. See also *Kershaw* v. *Kelsey*, 100 Mass. 561, at 568-574, where the question is discussed by Mr. Justice Gray whose opinion has received the approval of this Court in *Briggs* v. *United States*, 143 U. S. 346, at 353.

See further:

Williams v. *Paine*, 169 U. S. 55, at 72;
Birge-Forbes Co. v. *Heye*, 251 U. S. 317, at 323.

In an article entitled "Force Majeure" by Hon. John Bassett Moore, a member of the Permanent Court of In-

ternational Justice, found re-printed in Meares "Trading With the Enemy Act", it is said, pages 461-463:

"*IV.* AMERICAN AND ENGLISH JURISPRUDENCE.

American and English law have admitted, only to a certain extent, the principle of the dissolution of contracts by *force majeure,* although the courts of England have in recent years, and especially during the present war, with the extraordinary changes which it has wrought in commercial conditions, shown a tendency to give to the principle a more extended application.

But, however, this may be, it is not open to doubt that, *by the law of England and of the United States, pre-war executory contracts between enemies, the performance of which requires continued and continuous acts of commercial intercourse between them, are dissolved by reason of the existence of the war."* (Italics ours.)

"Oppenheim is therefore well justified when he states that, from the general principle asserted in the leading cases (citing *The Hoop,* 1 C. Rob. 196; *Potts* v. *Bell* (1800), 8 D. & E. 548; *Furtado* v. *Rogers* (1802), 3 P. & B. 191; *Esposito* v. *Bowden* (1857), 7 E. & B. 763; *The Mashona* (1900), 10 *Cape Times Law Reports,* 170), the courts have drawn the following important consequences:

'(3) As regards contracts entered into *before* the outbreak of war (*Melville* v. *DeWold* (1855), 4 E. & B. 844; *Esposito* v. *Bowden* (1857), 7 E. & B. 763; *Ex Parte Boussmaker* (1806), 13 Ves. Jun. 71; *Alcinous* v. *Nygren* (1854), 4 E. & B. 217; *The Carlotta* (1814), 1 Dodson 390), a distinction must be drawn; (a) Executory contracts are avoided, both parties being released from performance, (b) Contracts executed before the

outbreak of war and not requiring to be acted upon during the war are suspended until after the conclusion of peace, (c) Executed contracts which require acting upon during the war are dissolved.

(4) Partnerships with alien enemies are dissolved.' International Law, 2d Ed. 1912, 136-137.

(a) American Decisions.

In the United States, what may be called the leading judicial case on the subject is that of *Griswold* v. *Waddington*, decided by the court of errors of New York in 1819. The particular question was that of a partnership, and the principal opinion was delivered by that great authority on the law of nations, Chancellor Kent. The case came up from the Supreme Court of the State, which had decided that the partnership, composed of a British subject living in London, and three citizens of the United States, was dissolved by the outbreak of war between the two countries in 1812. Addressing himself to this point, Chancellor Kent held 'that the declaration of war did, of itself, work a dissolution of all commercial partnerships, existing at the time, between British subjects and American citizens'.

There were, said Kent, no cases in the English books, exactly in point. The question apparently had not been raised, presumably because it had 'been deemed too difficult a proposition to be even hazarded'.

He maintained that 'the partnership existing before the war, was from reason and necessity, dissolved by the act of war'.

Griswold v. *Waddington* (1819), 16 Johns. 438.

The authority of the foregoing decision has never been questioned. The same principle was enunciated in the case of *The William Bagley,* in which Mr. Justice Clifford, speaking for the Supreme Court of the United States, said:

> 'Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress.' *The William Bagley* (1866), 5 Wall. 377."

This principle of International Law, resting upon sound principles of public policy, has been recognized as settled common law by the courts since *Griswold* v. *Waddington,* 16 Johns. 438, and was reaffirmed by the legislative prerogative of Congress in the enactment of the Trading With the Enemy Act, by which such intercourse was made not only illegal (Sec. 3) but criminal (Sec. 16).

For recent cases holding that executory contracts, the performance of which necessitates commercial intercourse or trading of whatever kind with an alien enemy, are entirely terminated by the existence of a state of war, we refer to:

Second Russian Insurance Co. v. *Miller,* 297 Fed. 404, at 410 (C. C. A. 2nd, aff'd 268 U. S. 552);

Joring v. *Harriss,* 292 Fed. 974 (C. C. A. 2nd, certiorari denied, 263 U. S. 710).

In *Joring* v. *Harriss, supra,* the plaintiffs, who in early 1917 resided in the United States, with orders from Austria for cotton, made a contract in February, 1917, with the defendants by the terms of which defendants agreed to ship the cotton to Spain and store it for certain Austrians for delivery and payment at close of the war. The profits in the transaction were to be shared between the parties. The defendants shipped and stored the cotton, but after the outbreak of war between Germany and the United States, April 6, 1917, making Austria-Hungary an ally of enemy, and after the passage of the Trading With the Enemy Act, October 6, 1917, the defendants sold the cotton to Spaniards. The plaintiffs sued under the above mentioned contract to obtain a share in the profits from this disposal of the cotton. The Court, per Hough, Circuit Judge, denied recovery on the basis that the "*declaration of war and/or the Trading With the Enemy Act*" (p. 979) forbade trading with the buyers after the outbreak of hostilities; that "trading" included "carrying on" any contract, agreement or obligation; that in storing the cotton in Spain during the war the contract would be "carried on"; and therefore, by statute, this contract came to an end. On page 979 the Court added:

> "We might go farther as we are of the opinion that this agreement became against public policy on April 6, 1917. The effect of the contracts made was that the money, property and credits of certain citizens of the United States were tied up in the carrying or keeping of 10,000 bales of cotton for the ultimate benefit of an ally of the enemy."

In the case at bar the record bristles with evidence that the contract of deposit in order effectually and

efficiently to be carried out by the parties depends *in its essence* upon free and untrammeled communication between them. The existence of such communication was a material part of the agreement—so material that unless it was available the contract must be held to have become impossible of performance through no fault of either party, and their respective rights accordingly adjusted.

These plaintiffs, upon the inception and during the existence of the war, were faced by a dilemma. The account was useless to them unless they could communicate with the defendant bank, whereas by attempting to so communicate they must have taken steps violating the rules of international law, of common law and of statute. The situation is indeed anomalous if a contract is preserved in spite of the fact that performance of one of its essential terms has been made illegal by every conceivable rule of law.

Contracts between nationals of enemy countries, resident within their respective countries, are terminated when the circumstances are such that it would be inequitable to revive them.

In *New York Life Insurance Co.* v. *Statham*, 93 U. S. 24, the Court, discussing the effect of war on contracts, said, pages 31-32:

> "It (the court below) supposes the contract, to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material?"

And further:

> "The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice and cannot be invoked to revive a contract which it would be unjust or inequitable to revive."

In this case the Court held that a life insurance contract with a provision for forfeiture on non-payment of premium was extinguished by such non-payment even though it was caused by the intervention of the Civil War. It is not clear that the Court expressly declared the contract terminated by virtue of the mere existence of the state of war, the assured being residents of Mississippi and the defendant a New York corporation, although the language just quoted indicates that this is so. It may perhaps be argued that the contract was declared by the Court to be terminated by virtue of the operation of the forfeiture clause. If the latter view is correct, it is submitted that the Court has seized upon the forfeiture clause as the most convenient way of declaring the contract at an end. The Court undoubtedly based its result on the ground that the time of payment of premium was of the essence in insurance contracts, by reason of the company's reliance upon prompt payments in figuring rates, and, therefore, in the circumstances, if the contract survived as against the insurance company, an inequitable situation would have resulted when payment of premiums was belatedly made after the war. In holding time of the essence of this agreement, it is submitted that the Court determined the promise to pay premiums an absolute one, the failure of performance of which is inexcusable on any ground. But the practical result and *effect* of the decision is certainly that *war*

terminated the contract, even though the exact *holding* may be considered to have been that the contract was terminated by "non-payment of the premium, even though the payment was prevented by the existence of the war" (p. 33). The policy was terminated because of non-payment of premium, but such payment was defaulted because it was impossible and illegal under the rule of non-intercourse between persons divided by the line of war, and this rule arose because of the inception and existence of a state of war. Suppose the parties to a contract stipulate that it shall terminate in the event of war between their respective nations. If war breaks out the contract admittedly will terminate, and it becomes unnecessary to decide whether the result is reached by enforcement of this clause in the contract, or as a matter of law, by the existence of a state of war. So in the *Statham* case. The parties contemplated forfeiture in the event of non-payment whatever the cause of non-payment: in effect, an implied covenant that in case of war preventing payment the contract would end. Thus the contract is ended, be it by operation of law or by virtue of the agreement—a question not necessary for the Court flatly to decide.

In any event, the *test* formulated in the *Statham* case as to the revival of a contract only when revival is equitable, has not been challenged in subsequent decisions. Of course, the doctrine that where time of payment is of the essence, and the payment is not made on time, the contract will not be suspended because, upon revival, the parties will not find themselves in *status quo ante,* is only a part of or more specific application of the broader general rule stated in the *Statham* case. The only reason there that the premiums were not paid on time being the rule of non-intercourse due to war (p. 25),

the Court might have equally well specifically held, and, we submit, did in effect hold, that commercial intercourse was of the essence of the contract.

Applying this test to the contract at bar, it was in contemplation of the parties and the essence of the agreement, that the money deposited be available to and subject to the order of the depositor at all times. The usefulness and the very purpose of this deposit was nullified unless orders of withdrawal were easily and readily honored. If the account was not available for use in current business it was no longer fulfilling the purpose for which it was created. The inequity of merely suspending contracts of this nature is apparent. The fact that the plaintiffs in this case were compelled to open a new kronen account with the Wiener Bank-Verein at the end of the war because the kronen in their old account had ceased to be legal tender in March, 1919, is significant (R. 109).

It is submitted to be obvious that to do other than declare the contract, under which this deposit was made, totally abrogated by the declaration of war will violate the test established in the *Statham* case, by which "considerations of equity and justice" are invoked to determine whether the contract should be revived at the termination of hostilities.

No case has been found as to the effect of war upon contracts between a bank and its depositor but authority is available in other cases of executory contracts not unanalogous to the instant question.

Joring v. *Harriss, supra;*
Atlantic Communication Co. v. *Zimmermann,*
182 App. Div. 862;

Zinc Corp., Ltd. v. *Hirsch* (1916), 1 K. B. 541;

Clapham S. S. Co., Ltd. v. *Naamloose Vennootschap Handels-en Transport-Maatschappij Vulcaan* (1917), 2 K. B. 639;

Ertel Bieber & Co. v. *Rio Tinto Co.* (1918), A. C. 260.

In *Ertel Bieber & Co.* v. *Rio Tinto Co., supra,* an English company, prior to the war, contracted to sell to three German companies quantities of ore to be delivered over a number of years. Each contract contained a clause that it be suspended merely on the outbreak of war. When war was declared some of the contracts were wholly and some partly executory. The plaintiffs asked for a declaration that all the contracts were dissolved. It was held by the House of Lords that the declarations be made, since the contracts involved trading with the enemy and as such were totally abrogated.

In view of the clause merely suspending the contract in case of war, the case is especially significant and clearly indicates the attitude of the House of Lords in matters of this kind. A contract requiring for its performance intercourse with the enemy is entirely and totally abrogated, irrespective of any agreement of the parties to the contrary.

To sum up: It is our position that on April 6, 1917, at the declaration of war between the United States and Germany, making Austria-Hungary an ally of enemy, or at the latest, on December 7, 1917, at the declaration of war between the United States and Austria-Hungary, the contract between the plaintiffs and defendant bank which created the relationship of bank and depositor and which pre-existed the war, *and all the incidents thereto*

pertaining, came to an end. This result is reached either because the contract was one requiring intercourse with the enemy, or, to put it differently, because the contract was one which, under all its terms and the surrounding circumstances, it is inequitable to revive, intercourse with the bank being of the essence.

It follows that *no term* of that contract can be insisted upon by the defendant bank and, consequently, as discussed elsewhere in this brief (Point V, *infra*), the contract cannot by its terms, if any such there were, be subjected to Austrian law. That term, if it ever existed, as well as every other, fell when the contract fell. Furthermore, no demand, as possibly provided for, was necessary in order that the amount of the deposit become due and payable to the plaintiffs as of the date war was declared. If a contract becomes impossible of performance, or is terminated without fault of either party, and if one party has paid money thereunder greater in amount than the value of the performance which has been made by the other party, the former may recover said money back in an action for money had and received—not under the contract, but on the basis of a *quantum valebat* or a *quantum meruit*.

> *New York Life Insurance Co.* v. *Statham*, *supra*, at 33, *et seq.* (93 U. S. 24);
> *Atlantic Communication Co.* v. *Zimmermann*, *supra* (182 App. Div. 862).

See also:

> *III Williston, Contracts*, Sec. 1974.

The *Atlantic Communication* case is squarely in point. The plaintiff had paid dollars to defendants in

consideration of the defendant's promise to effect a mark payment in Germany. By virtue of the intervention of war performance by defendants became impossible, and plaintiff sued to recover the dollars paid in. It happens that the defendants in that case are the plaintiffs here, and that the *Atlantic Communication* case was one of the many of the same nature in which recoveries of dollars were made, and where, because of having "covered" the transaction and having changed their position, the defendants could not be put back in *statu quo* after a rescission of the contract, and a recovery by the plaintiff in money had and received. After judgment for defendants, plaintiff's motion for a new trial was denied, and plaintiff appealed. In reversing this judgment and order the Court said (p. 868):

> "This was a purchase of a wireless transfer of credit for 250,000 marks, which credit was by wireless to be made available for plaintiff's immediate use in Berlin, and on defendants' failure to perform, owing to performance having been rendered impossible by reason of the war conditions, plaintiff would be entitled to the return of its money."

The case was retried, resulting in judgment for plaintiff. Defendants appealed to Appellate Division which affirmed without opinion, and defendants' motion for leave to appeal to the Court of Appeals was denied after the decision in *Gravenhorst* v. *Zimmermann*, 236 N. Y. 22, was handed down by the Court of Appeals a few days later.

For the reasons stated in the opinion above quoted it is submitted that plaintiffs' action for money had and received arose when war was declared.

c. There is nothing in the treaty of Vienna, incorporating provisions of the Treaty of St. Germain, to prevent the recovery by plaintiffs of the kronen owed at a pre-war rate of exchange.

It may be argued that the framers of the Treaty of Vienna considered the question of the effect of the war on contracts between enemies when in Section 1 of Article II of the treaty of August 24, 1921, with Austria, Part X of the Treaty of St. Germain was incorporated *inter alia* as defining the rights and advantages it was intended the United States should enjoy. Section V of Part X of the Treaty of St. Germain covers "Contracts, Prescriptions, Judgments". Subdivision (a) of Article 251 of that section provides:

> "Any contract concluded between enemies shall be regarded as having been dissolved as from the time when any two of the parties became enemies * * *."

But subdivision (c) of that Article declares:

> "Having regard to the provisions of the Constitution and law of the United States of America, * * * neither the present Article * * * nor the annex hereto shall apply to contracts made between nationals of these States and nationals of the former Austrian Empire; * * *."

The argument of the defendant bank may be, that since the question of abrogation of contracts was considered, and the United States specifically exempted from the operation of the treaty clause contracts between American and Austrian nationals, the intention of the parties was that such contracts should not be declared terminated by outbreak of war.

It is submitted that subdivision (c) of Article 251 has no effect other than its wording indicates; it does nothing more than exempt the United States from the stipulations of Articles 251, 252 and 257. If Article 251 changes the common law in respect to the effect of war on executory contracts, it has no bearing on the case before the Court because, by its terms, it excludes contracts between American and Austrian nationals. If on the other hand it is declaratory of the common law, its inapplicability to contracts between citizens of the United States and Austria is immaterial. It cannot reasonably be argued that the refusal of a legislative body to adopt a statute or approve a treaty declaratory of the common law evidences an intent on the part of that body to change the common law rule and has the effect of making the previous common law rule inapplicable to the subject matter theretofore controlled by it. Suppose an extreme case: Assume the treaty provided that agreements between citizens of enemy countries, unsupported by consideration, should not be classed as "contracts" under Article 251, and that this provision should not apply to contracts between citizens of the United States and Austria, it clearly could not seriously be argued that the clause thus exempting contracts between nationals of the United States and Austria evidenced an intent on the part of the United States that the rule of the common law as phrased in the treaty should no longer be applied to such contracts.

It seems equally obvious that the argument cannot be evoked to make inapplicable other provisions of the treaty under which the plaintiffs as nationals of the United States have rights and privileges. As indicated above, subdivision (c) of Article 251 exempts the United States

from the operation of Articles 251, 252 and 257 and that is all. The contention that the mere use of the word "contract" in an inapplicable Article will result in the inapplication of every Article under which a contract right could be asserted, needs only to be stated in order to be refuted. Furthermore, the full text of subdivision (a) of Article 251 indicates that not all obligations that might properly be included under the word "contracts" were considered:

> "Any contract concluded between enemies shall be regarded as having been dissolved * * *, except in respect of any debt or other pecuniary obligation arising out of any act done or money paid thereunder * * *."

It is submitted that nothing in Article 251 of Part X of the Treaty of St. Germain prevents the application either of ordinary rules of common law or other Articles of that treaty to the contract with the Wiener Bank-Verein here under consideration.

III. THERE WAS A DEMAND ON OR ABOUT MARCH 25, 1919, BY THE FILING OF A CLAIM WITH THE ALIEN PROPERTY CUSTODIAN.

On or about March 25, 1919, the plaintiffs filed with the Alien Property Custodian a notice of claim against the Wiener Bank-Verein Trust (R., 48). A substantial copy of this document is Plaintiffs' Exhibit 4 and appears in the record at pages 49-56. The claim was for "monies and securities due to claimant" from the defendant bank, and specifically set forth as due a cash balance of 2,951,027.33 kronen. This suit is now brought for 2,063,799.03 kronen (R., 19). Accrued interest at four

per cent. was claimed on the above mentioned cash balance from January 1, 1916. It claims, therefore, a debt due and owing on January 1, 1916.

Subsection 8 (a) of the Trading With the Enemy Act reads in part as follows:

> "Sec. 8 (a). That any person not an enemy or ally of enemy * * * who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, * * * may terminate or mature such contract by *notice* or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such *notice* and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally. * * *"
> (Italics ours.)

We respectfully submit that this notice filed with the Alien Property Custodian on March 25, 1919, had the effect of maturing the debt of the defendant bank to plaintiffs *if it should be held that such obligation to pay did not exist theretofore.* The amount demanded in the notice is greater in total than the amount sued for here, and of course includes the latter.

It must be obvious that during the period of the war it was practically impossible for plaintiffs to know exactly what their balance was on the books of the defendant bank. Credits and debits frequently were made by both sides on their own books, the advices of which failed to

reach the other, or which were unexecuted for other reasons. In fact, the plaintiffs did not know until long after hostilities had ceased how many of hundreds of pre-war orders, which they had sent between October 6, 1916 and April 3, 1917 and debited on their own books, had been executed.

Furthermore, even the defendant bank had as late as April 1, 1920 no accurate knowledge of the exact state of the account. In its letter of that date to the plaintiffs it said:

> "As the situation is at present, we are much to our regret not in a position to comply with your wishes and to reverse all our entries in order to re-establish the balance of April, 1917, *the whole account being in a great mix-up and all entangled, a great many of your pre-war orders having been executed against your German-Austrian Kronen account and a good many after-war orders having been effected against your old Kronen account, so that it is very hard to ascertain now which is which*" (R., 110-111). (Italics ours.)

Counsel for the defendant bank in their briefs below have conceded that it would have been possible and proper to mature the deposit by filing a demand therefor with the Alien Property Custodian, pursuant to Subsection 8 (a) of the Trading With the Enemy Act, but claims that this was not done. Counsel for both the defendant bank and the Alien Property Custodian seem to make some technical distinction between claims filed under Subsection 8 (a) of the Trading With the Enemy Act and claims filed under Section 9 of that Act. We will concede that it is possible that a claim filed under Subsection 8 (a) might not comply with the requirements of a claim

to be filed under Section 9 of the Trading With the Enemy Act. However, it seems clear to us that a claim filed under Section 9 of the Act fulfills all the requirements of a demand under Section 8 (a). The Act does not prescribe that the claims shall be filed in any specified form and where the plaintiffs filed a notice of claim under Section 9 of the Act, setting forth that a debt arising out of a deposit with a foreign bank was due and owing to them, it seems clear that such a proceeding complies with all the requirements of Section 8 (a). No useful purpose could be served by requiring the plaintiffs to serve on the Alien Property Custodian a demand, and subsequently to file a claim based on that demand. The defendants concede in the present case that the service of a bill of complaint in this suit was a sufficient demand to make the debt due. If the complaint in this action is such demand it is difficult to see how the defendants can consistently assert that the claim filed with the Alien Property Custodian in March, 1919 was not also such a demand. The distinction insisted on by counsel for the defendants would seem to be unjustified by the Act or by any reason of justice or expediency.

B. Under Treaty Provisions.

Under the Treaty of August 24, 1921, between the United States and Austria, the plaintiffs below are entitled to have this Court apply the pre-war rate of exchange for United States dollars and Austrian kronen with interest at the rate of five per cent. per annum in determining the amount of the debt owing to the plaintiffs by the Austrian defendant.

Under the Constitution and repeated decisions of the United States Supreme Court, treaties made under the

authority of the United States are the supreme law of the land and are as much a part of the law of the United States as an act of Congress or the Constitution itself.

Constitution, Article VI;
Ware v. *Hylton*, 3 Dall. 199;
Ogden v. *Blackledge*, 2 Cranch 272;
Hopkirk v. *Bell*, 3 Cranch 454, 4 Cranch 164;
Higginson v. *Mein*, 4 Cranch 414;
United States v. *Schooner Peggy*, 1 Cranch 103, 109;
Head Money Cases, 112 U. S. 580;
United States v. *Percheman*, 7 Peters 51;
Chae Chau Ping v. *U. S.*, 130 U. S. 581;
Whitney v. *Robertson*, 124 U. S. 190;
Blythe v. *Hinckley*, 173 U. S. 501, 508;
Hauenstein v. *Lynham*, 100 U. S. 483;
State of Georgia v. *Brailsford*, 3 Dall. 1;
Jones v. *Walker* (Opinion by Jay, *C. J.*, not dated), 2 Paine 688;
Foster v. *Neilson*, 2 Peters 253;
Lessee of Pollard's Heirs v. *Kibbe*, 14 Peters 353.

In the Treaty of Peace between the United States and Austria, signed August 24, 1921 (42 Stat. L. 1946, United States Treaty Series No. 659), Austria grants and the United States reserves all the rights, privileges, indemnities, reparations or advantages specified in the joint resolution of Congress of July 2, 1921 (42 Stat. L. 105, Public Resolution No. 8, 67th Congress), including those stipulated for the benefit of the United States in the Treaty of St. Germain-en-Laye (United States Treaty Series No. 659).

The Joint Resolution of Congress of July 2, 1921, which is specifically set forth in the preamble and referred to in the body of said treaty, reserves to the United States of America and its nationals any and all rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same, which under the Treaty of St. Germain have been stipulated for its or their benefit.

Therefore, it seems clear that although the Treaty of St. Germain was not ratified as such by the United States, the nationals of the United States are entitled by virtue of Act of Congress and the Treaty of Vienna to whatever rights, privileges and advantages were stipulated for the benefit of nationals of the Allied and Associated Powers in the Treaty of St. Germain. In this regard Article II of the Treaty of Vienna reads as follows:

> "With a view to defining more particularly the obligations of Austria under the foregoing Article with respect to certain provisions in the Treaty of St. Germain-en-Laye, it is understood and agreed between the High Contracting Parties,
>
> (1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Parts V, VI, VIII, IX, X, XI, XII and XIV."

The only question, consequently, is whether the Treaty of St. Germain confers any rights, privileges or advantages upon an American national bringing an action under Section 9 of the Trading With the Enemy Act.

Among the provisions of the Treaty of St. Germain, to the benefit of which the United States and its nationals

are entitled, are the provisions of Part X, entitled "Economic Clauses". In Section IV of Part X is found Article 249 entitled "Property, Rights and Interests". Under this Article the United States was entitled to retain and liquidate all the property which had been taken under its control through the operation of the Trading With the Enemy Act and which is now found in the hands of the Alien Property Custodian. Subdivision (h) of Article 249 provides as follows:

> "(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, other than proceeds of sales of property or cash assets in Allied or Associated countries belonging to persons covered by the last sentence of paragraph (b) above, shall be dealt with as follows:
>
> (1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Austria resulting therefrom shall be dealt with as provided in Article 189, Part VIII (Reparation), of the present Treaty.
>
> (2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Austria shall be paid immediately to the person entitled thereto or to his Government; the

proceeds of the property, rights and interests, and the cash assets of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (b) received by an Allied or Associated Power shall be subject to disposal by such Power *in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto.* Any such property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 189, Part VIII (Reparation) of the present Treaty." (Italics ours.)

It will be observed that Sub-paragraph (1) of Subdivision (h) relates to Powers which adopt Section III of Part X of the Treaty of St. Germain. Sub-paragraph (2) of Subdivision (h) relates to Powers which do not adopt Section III.

Section III of Part X of the Treaty of St. Germain, being Article 248 and Annex, relates to a settlement through the intervention of Clearing Offices established by the respective parties, as stated in said Article. It was not contemplated at the time of the negotiation of the Treaty of St. Germain that the United States should adopt the plan set forth in Section III and establish the clearing offices mentioned therein. Accordingly, the treaty did not make the provisions of Section III obligatory upon the Allied and Associated Powers, but gave to each of them an option (Art. 248, Annex (1)). It may be said in passing that one of the reasons why it was not contemplated that the United States should adopt the clearing office plan was that under paragraph (b) of

Article 248 the Powers adopting that plan would make themselves responsible for the payment of debts, as stated, and it was not expected that legislation to this effect would be readily obtainable in the United States.

But, while the United States did not contemplate the adoption of the clearing office plan, a definite provision was made to meet its situation in Paragraph 4 of the Annex following Article 250. This paragraph is as follows:

> "All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire or debts owing to them by Austrian nationals, and with payment of claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian authorities since July 28, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property,

rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied."

This paragraph relates to property, rights and interests of Austrian nationals within the territory of an Allied or Associated Power, and it thus embraces the property, rights and interests of Austrian nationals within the territory of the United States and which have been taken over under the Trading With the Enemy Act and are held in the possession of the Alien Property Custodian. Paragraph 4 relates to the net proceeds of the sale, liquidation or other dealing with this property, for Article 249 entitled the United States to sell, liquidate and deal with this property. Paragraph 4 expressly provided that the property rights and interests of Austrian nationals within the United States and the net proceeds of their sale, liquidation or other dealing therewith might be charged by the United States with certain claims and liabilities stated in that paragraph. Among such charges it is provided that such property and proceeds might be charged with "debts owing to them (that is, to United States nationals) by Austrian nationals"; that is to say, it was expressly agreed in the Treaty of St. Germain that the property in the hands of the Alien Property Custodian, taken under the Trading With the Enemy Act, could be charged with debts, owing to citizens of the United States by citizens of Austria. While the provision of Article 4 obviously was intended to apply to the United States, there is interesting internal evidence, aside from the use of the term "Associated Power", of this intent in the provision that the property in the hands of the Alien Property Custodian could be charged with the payment of claims growing out of acts committed by

the former Austro-Hungarian Government since July 28, 1914, and "before that Allied or Associated Power entered into the war". That was the American contribution to this portion of the Treaty of St. Germain.

Provision is made in paragraph 4 for an assessment of claims by an arbitrator appointed by Mr. Gustave Ador, or if he made no appointment by an arbitrator appointed by the Mixed Arbitral Tribunal, provided for in Section VI. In lieu of setting up the Mixed Arbitral Tribunal, the United States Government entered into a claims convention with Austria, for the presentation and consideration of claims. The assessment by such a Tribunal was not, however, an exclusive provision, for the United States under Article 249 was to have the right to retain and liquidate the property belonging to Austrian nationals within its territory and to carry out its liquidation in accordance with its laws.

Referring again to sub-paragraph (2) of sub-division (h), it will be seen that this relates to the United States as a Power not adopting Section III (for the United States, as was contemplated, has not adopted Section III, the clearing office plan), and this sub-paragraph provides that the proceeds of the property of Austrian nationals received by the United States shall be subject to disposal by the United States, *in accordance with its laws and regulations*, and may be applied in payment of the claims and debts defined by Article 249 and by paragraph 4 of the Annex, above quoted.

Thus there is the most explicit provision that the United States, under its treaty with Austria (the Treaty of Vienna), is entitled to the benefit of this provision in the Treaty of St. Germain, is entitled to charge against the property in the hands of the Alien Property Custodian the debts owing to its nationals, and having provided

remedies to its nationals by Section 9 of the Trading With the Enemy Act, there is direct treaty support of the right of these nationals to obtain that recovery for their debts from the property in the hands of the Alien Property Custodian, in accordance with the provisions of the Trading With the Enemy Act.

In paragraph 14 of the Annex which follows Article 250 and is the Annex referred to in Article 249, appears the following provision:

> "The provisions of Article 249 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.
>
> In the settlement of matters provided for in Article 249 between Austria and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Austria that one or more of the said provisions are not to be applied."

This, again, is a provision to the benefit of which the United States and its nationals are entitled by the explicit provisions of the Treaty of Vienna. And while the United States did not adopt the clearing office plan

of Article 248 of the Treaty of St. Germain it became entitled by virtue of paragraph 14 of the Annex following Article 250, being the Annex referred to in Article 249, with respect to the rate of exchange and interest which had been provided in Section III, for it is stated in paragraph 14 that in the settlement under Article 249 where a Power has not made a declaration adopting Section III, which is the case of the United States, and between the respective nationals, that is, between the nationals of the United States and the nationals of Austria, "the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty, notify Austria that one or more of the said provisions are not to be applied". No one would contend, or could contend, that the United States had given any such notice. Accordingly, the citizens of the United States, in enforcing their rights under the Trading With the Enemy Act, conserved by the Treaty of Vienna, making applicable the provisions of the Treaty of St. Germain, are entitled to have the rate of exchange and of interest applied which are specified in the provisions of Section III.

Turning then to the provisions of Section III, thus incorporated by reference in paragraph 14 of the Annex following Article 250, the following provision is found in sub-division (d):

> "(d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned

If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of the new States of Poland and Czecho-Slovak State the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII, unless they shall have been previously settled by agreement between the states interested."

And the following provision is found in paragraph 22 of the Annex to Article 248:

"Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital.

> The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.
>
> Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.
>
> Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts."

Thus, under paragraph (d) above quoted, American nationals are entitled to the pre-war rate of exchange and, under paragraph 22 above quoted, the rate of interest is defined.

In its opinion in the instant case the Circuit Court of Appeals said, 7 Fed. (2d) 445:

> "There are several matters discussed at bar as to which discussion in this Court may cease; we have expressed views which will remain in force until corrected by higher authority. * * * That the provisions of the Versailles Treaty do not affect nor relate to claims like that against the Deutsche Bank we have already so held in the *Guinness* case, *supra*."

The terms of the Treaty of Versailles are *mutatis mutandis*, the same as those of the Treaty of St. Germain in this regard, Articles 248, 249 and 250 of the Treaty

of St. Germain corresponding, respectively, to Articles 296, 297 and 298 of the Treaty of Versailles.

It is quite evident that the Circuit Court of Appeals in the *Guinness* case did not understand the provisions of the Treaty of Versailles and failed to give them appropriate effect. Thus, it is said that it was recognized that the plan of Article 296 (Clearing Office plan) had not been adopted by the United States. And reference is made to the provision of paragraph 14 of the Annex to Article 296, above quoted. But, when the Court came to deal with Article 296, it apparently failed to appreciate the terms of that Article, for the Court says at 299 Fed. 282, 283:

> "Article 296 has no reference to payment of debts of Germans due an American. In part of Section IV of Article 296, which is headed 'Property Rights and Interest', provision is made for dealing with and liquidation of property belonging to nationals of allied and associated powers who were in Germany during the war, or property of Germans which was within the territory of the allied and associated powers during the war. It is true that sub-division 14 of the Annex to Section IV includes debts, credits, and accounts, but that is a provision under Article 297, which does not deal with the payment of debts between nationals of various powers, shall include within its scope not only tangible property within the various countries, but also intangible. Credits are made property within the meaning of Article 297 between Germany and the associated states and between their respective nationals. The provision of Section III respecting currency in which payment is to be made and the rate of exchange and interest shall apply unless the governments of the

allied and associated powers concerned shall, within six months of the coming into force of the present treaty, notify Germany that such provisions are not to be applied. Sub-division 14 provides that in the settlement of matters provided for in Article 297, the provisions as to the rate of exchange and interest provided for in Section III shall apply. And Article 297 provides for the liquidation by the allied and associated powers of all property rights and interest belonging, at the time of the coming into force of the present treaty, to German nationals and companies controlled by them within the territories of the allied and associated powers. Thus the provisions as to the rate of interest and exchange provided for in Section III are made applicable to Article 297 by Sub-division 14 of the Annex to Section IV, namely, in the instance of the liquidation of properties of Germans within the United States.

Sub-division E of Article 297 provides that nationals of the Allied and Associated Powers shall be entitled to compensation with respect to damage or injury inflicted upon their property rights or interests, including any company or association in which they are interested in German territory as it existed on August 1, 1914. This is another instance where the rate of exchange and interest applied, namely, where Germany liquidates the property of American nationals where the property was in Germany as of August 1, 1914, Germany must use the rate of exchange and interest provided for in Section III. We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act, when the purpose of the suit is to collect a debt owing to an American

> citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. The rate of exchange is in no way provided for, if such procedure is instituted under Article 297 of the Treaty of Versailles."

This quotation, dealing with Article 297, starts out with the extraordinary statement: "Article 297 has no reference to payment of debts of Germans due an American." Counsel confess that they are unable to understand this statement, as paragraph 4 of the Annex following Article 298, which is ordinarily called the Annex to Article 297, was inserted for the express purpose of protecting debts due by Germans to Americans. That was not only the purpose but that is the explicit provision of the Article. In view of this misconception, it is hardly necessary to follow the reasoning of the Court, for it was obviously mistaken. The Court deals with paragraph 14 of the Annex following Article 298, called the Annex to Section IV, but disposes of it by saying that "that is a provision under Article 297, which does not deal with the payment of debts between nationals of various Powers", whereas Article 297, as we have shown, deals expressly with the debts due the nationals of the United States as an Associated Power from German nationals and deals with these debts in relation to the liquidation of property of German nationals held by the United States. By taking debts due from Germans to citizens of the United States out of Article 297, the Court below would defeat the whole purpose of this part of the Treaty of Versailles negotiated by the American Government, and, while not ratified, saved in these provisions by the Treaty

of Berlin. The Court of Appeals concludes its statement by saying, after referring to sub-division (e) of Article 297, that it regards these provisions as having no application to a suit under Section 9 of the Trading With the Enemy Act, when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. But the provisions of Article 297, that is to say, of paragraph 4 of the Annex following Articles 297 and 298, and referred to in Article 297, apply expressly to the case of a debt owing to an American citizen which is to be satisfied out of the property of an enemy in the United States and are intended directly to apply to the case where property had been seized by the Alien Property Custodian and now held by the Treasurer of the United States. Section 9 of the Trading With the Enemy Act is a method adopted by the United States to permit an American citizen to get his debt out of the property of a German national, and is contemplated by the Treaty of Versailles and the Treaty of Berlin.

It should be borne in mind that in considering the rights of the parties under the Treaty of Vienna applying the provisions of the Treaty of St. Germain, the question as to whether or not the debt owed by the Austrian defendant to the plaintiffs was due on any particular date is irrelevant. Paragraph 22 of the Annex (Section III) to Article 248 of the Treaty of St. Germain, relating to interest, is made applicable by paragraph 14 of the Annex in Section IV (following Article 250), and paragraph 22 expressly covers the cases of debts falling due during the war. Such debts are clearly within paragraph 4 of the Annex following Article 250 as being debts to

the payment of which property held by the Alien Property Custodian may be applied. The purpose of Section 9 of the Trading With the Enemy Act is to cover such cases. Plaintiffs clearly have a right, under Section 9 of the Trading With the Enemy Act to bring an action against the Alien Property Custodian to establish a debt owing to them by the Austrian national. While there is a restriction that such debt must have been owing to and owned by them on October 6, 1917, there is no limitation requiring that it must have been due prior to that date or at any particular date. The debts defined in paragraph 4 of the Annex to Article 249 (following Article 250) of the Treaty of St. Germain, are "debts owing" to American nationals by Austrian nationals, and by the express words of paragraph 14 of the same Annex the provisions of Article 249 are made to apply to "debts, credits and accounts". There is no limitation in this section of the Treaty which requires proof that the debt be due on any particular date. The only significance of the question as to whether or not the debt was due arises in determining under the common law and aside from treaties the rate of exchange at which the debt shall be paid. If the plaintiffs below are compelled to rely alone upon their rights at common law and aside from treaties to establish the debt claimed under Section 9 of the Trading With the Enemy Act, the question of the due date of the debt is relevant to determine the rate of exchange applicable and the date from which interest shall run. However, since the Treaty (par. 14, Annex Section IV applying Article 248 (d), Section III) specifically directs the application of a uniform rate of exchange to all debts owing by Austrian nationals to American nationals and to all credits and accounts, whether due or not, it seems clear that the only evidence neces-

sary to establish the plaintiffs' case is to prove a debt owing from the Austrian defendant to the plaintiffs, which was owned by them prior to October 6, 1917. This has concededly been done. We submit that under the Treaty between the United States and Austria of August 24, 1921, which is law in this country, the plaintiffs have the above described rights with reference to rate of exchange and rate of interest.

In the recent case of *United States of America* v. *Chemical Foundation*, decided by this Court, October 11, 1926, Mr. Justice Butler speaking for the Court, said:

> "There is no support for a construction that would restrain the force of the broad language used. Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners. There is no constitutional prohibition against confiscation of enemy properties. *Brown* v. *United States*, 8 Cranch, 110, 122, 8 L. Ed. 504, 508; *Miller* v. *United States* (*Page* v. *United States*), 11 Wall. 268, 305, *et seq.*, 20 L. Ed. 135, 144; *Kirk* v. *Lynd*, 106 U. S. 315, 316, 27 L. Ed. 193, 1 Sup. Ct. Rep. 296; *Stochr* v. *Wallace*, 255 U. S. 239, 245, 65 L. Ed. 604, 612, 41 Sup. Ct. Rep. 293; *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 300, 70 L. Ed. 275, 279, 46 Sup. Ct. Rep. 116. And the Act makes no provision for compensation. The former enemy owners have no claim against the patents or the proceeds derived from the sales. It makes no difference to them whether the consideration paid by the Foundation was adequate or inadequate. *The provision that after the war enemy claims shall be settled as Congress shall direct conferred no rights upon such owners. More-*

*over, the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its nationals on account of the seizures and sales in question."** (Italics ours.)

* Part X, Sec. IV, Art. 297, and Annex PP 1 and 3, Treaty of Versailles, adopted by Article II (1), Treaty of Berlin, 42 Stat. at L. 1939, 1943.

This Part X, Sec. IV, Art. 297 and the Annex thereto of the Treaty of Versailles adopted by Article II (1) Treaty of Berlin, 42 Statutes at Large 1939, 1943, is identical with the portion of the Treaty of St. Germain upon which plaintiffs here rely in their contention for the payment of this kronen debt at a pre-war rate of exchange. If, as this Court said in the *Chemical Foundation* case, the Treaty of Berlin *prevents the enforcement* of any claim by German nationals against American nationals on account of seizures and sales of property taken over by the Alien Property Custodian it must affect private rights, and in fact must on the one hand annul and on the other hand grant private rights. And so with the Treaty of Vienna.

Again in *White* v. *Mechanics Securities Corporation*, 269 U. S. 283, decided December 14th, 1925, this Court has recognized the effect of the Treaty of Berlin. In that case the suits were brought under the Trading With the Enemy Act upon notes issued by the Imperial German Government and alleged to have been recognized by the present German Government. They sought to collect the amounts of the notes from funds alleged to have belonged to the Imperial German Government and taken over by the Alien Property Custodian. Mr. Justice

Holmes, speaking for the Court said, concerning the seizure of "enemy" funds by the Alien Property Custodian:

> "The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an act of Congress what shall be done with them, and that is the end of the matter. There is no question that such a seizure and disposition are within its powers. *Brown* v. *United States*, 8 Cranch, 110, 129, 3 L. Ed. 504, 510; *Miller* v. *United States* (*Page* v. *United States*), 11 Wall. 268, 20 L. Ed. 135. The Treaty with Germany has recognized their effect. Article 1 according the rights asserted by the joint resolution of July 2, 1921, Sec. 5, recited in the Treaty, 42 Stat. at L. 1939."

The idea of enforcing through local courts substantive rights which were vested by treaty has not only occurred to and been followed by courts and counsel in the past in respect of early treaties to which the United States was a party (cases cited at beginning of this point) but was undoubtedly entertained by the framers of the Treaty of St. Germain. For instance, Articles 248 and 249 of that treaty may be both briefly and accurately described as co-ordinate articles, where Article 248 provides for a clearing office system as a remedial instrument which may be used by any party to the treaty electing so to do, whereas Article 249 leaves to the Allied and Associated powers and their nationals the determination of the instruments through which rights conferred or confirmed by the treaty shall be enforced. A specific instance of such a situation, even as regards nationals of a country which ratified the Treaty of Versailles, is found in Article 297 of that treaty in the provision that where property

of Allied or Associated nationals is not restored by Germany the owner may claim restitution or compensation. There is no machinery created for the enforcement of such claims and Mr. E. J. Schuster, in his article "The Peace Treaty in its Effects on Private Property" in the British Year Book of International Law, 1920-1921, page 182, says that the above mentioned "right to restitution would have to be enforced through the ordinary channels" even by British subjects.

We may be certain, that with the crowd of matters which required adjustment, no vain word is spoken in the treaty. Each clause was intended to have meaning and effect.

The clauses which we have quoted can have, we submit, only a single meaning, the meaning which we have attributed to them, and which they quite clearly express. And this, moreover, is supported by the history of events which are still so recent that they are fresh in memory. That there was a strong sentiment in the United States against the relinquishment of property seized by the Alien Property Custodian is evidenced by Section 5 of the joint resolution of Congress which declared the peace almost three years after the Armistice (42 Stat. L. 105). It could scarcely be stronger at the time of the formulation of the Treaty of St. Germain, and it certainly was not weaker at that time. To release seized property to be dealt with by an International Clearing Office was so contrary to the feeling prevailing in the United States that the American delegates to the Peace Conference necessarily had to insist upon a provision allowing any country to retain the seized property and itself administer it. In doing so, however, they had equally to insist that American creditors should be given the same rights as they would have were the property administered by an

International Clearing Office. The provisions which we have quoted were obviously inserted with that purpose and effect. They have become the law of the land through their incorporation into the Treaty of Peace between the United States and Austria. This is established, we think, beyond question by the authorities.

It seems scarcely necessary to go further than this, but there have been in the past some very interesting and enlightening cases in which this Court has enforced private rights conferred by treaty and in which it has recognized the right of a Government to bind its nationals to the extent not only of sacrificing their rights *in rem*, but even of nullifying rights *in personam*.

In *Doe on the Demise of Clark, et al.* v. *Braden*, 16 How. 635, the suit arose out of the treaty of 1819 with Spain by which Florida was ceded to the United States. An action of ejectment was instituted, the plaintiff claiming title, under a grant from the King of Spain to the Duke of Alagon. The grant in question had been made prior to ratification of the treaty, but after the King of Spain had authorized his minister to negotiate it and after negotiations had actually commenced. It was insisted by representatives of the United States that an article should be inserted whereby this grant should be annulled by the Spanish Government, and accordingly such clause was inserted. Before ratifications were exchanged, the Duke informed the Secretary of State that he intended to rely upon the conveyance theretofore made to him. In the formal ratification by the Spanish King it was stated that this grant was annulled and that the grantee and those claiming title under him could not avail

themselves of the grant at any time. It was claimed by the plaintiff that the King of Spain had no power according to the Constitution of that country to annul this grant. In discussing this question, the Court said, at page 657:

> "It is said, however, that the King of Spain, by the constitution under which he was then acting and administering the government, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.
>
> But these are political questions and not judicial. They belong exclusively to the political department of the government."

It was further said, in the same connection, at pages 657 to 658:

> "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution

and laws, to make the engagements into which he entered.

In this case the King of Spain has by the treaty stipulated that the grant to the Duke of Alagon, previously made by him, had been and remained annulled, and that neither the Duke of Alagon nor any person claiming under him could avail himself of this grant. It was for the President and Senate to determine whether the king, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States and subject to and governed by their laws. And as the treaty is by the constitution the supreme law, and that law declared it public domain when it came to the possession of the United States, the courts of justice are bound so to regard it and treat it, and cannot sanction any title not derived from the United States.

Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers

are separated and placed in different hands. Certainly no judicial tribunal in the United States ever claimed it, or supposed it possessed it.

* * * It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the government might lawfully exercise over it, depended altogether upon the laws of Spain. And whatever rights he may have had under the deed of the Duke of Alagon, they were extinguished by the government from which he held them while the land remained a part of its territory and subject to its laws. It was public domain when it came to the possession of the United States, and he had then no rights to it."

This case of *Doe* v. *Braden* was cited with approval by this Court in the recent case entitled *United States of America* v. *State of Minnesota*, 270 U. S. 181, at 201, where the Court said:

"But while the earnestness of counsel has induced us to examine the basis of the argument advanced, there is another reason why the effort to overcome the cession must fail. Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress. Among the cases applying and enforcing this rule, some are particularly in point here. In *United States*

v. *Brooks*, 10 How. 442, 13 L. Ed. 489, where a grant made to certain individuals by the Caddo Indians in a treaty between them and the United States was assailed by the United States as induced by fraud practised on the Indians, the court held that 'the influences which were used to secure' the grant could not be made the subject of judicial inquiry for the purpose of overthrowing the treaty provision making it. In *Doe ex dem. Clark* v. *Braden*, 16 How. 635, 14 L. Ed. 1090, a provision in the treaty whereby Spain ceded Florida to the United States which annulled a prior grant to the Duke of Alagon was assailed as invalid on the ground that the King, who made the treaty, was without power under the Spanish Constitution to annul the grant. But the court refused to go behind the treaty and inquire into the authority of the King under the law of Spain, and this because, as was explained in the decision, it was for the President and Senate to determine who should be recognized as empowered to represent and speak for Spain in the negotiation and execution of the treaty, and as they had recognized the King, as possessing that power, it was not within the province of the courts to inquire whether they had erred in that regard. And in *Fellows* v. *Blacksmith*, 19 How. 366, 372, 15 L. Ed. 684, 686, where a treaty with the New York Indians was asserted to be invalid on the ground that the Tonawanda band of Senecas was not represented in the negotiation and signing of the treaty, the court disposed of that assertion by saying: 'But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the government, becomes the su-

preme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operations than they can go behind an act of Congress.' The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made seventy years after the treaty and forty years after the last instalment of the stipulated compensation of approximately $1,200,000 was paid to the Indians."

Article IV of the Definitive Treaty of Peace between the United States and Great Britain, concluded at Paris September 3, 1783, reads as follows:

> "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted. (Malloy, 'Treaties, Conventions, international Acts, Protocols and Agreements between the United States and other powers, 1776-1909', Vol. I, page 586.)"

The leading case under this article of the treaty is that of *Ware* v. *Hylton* (1796), 3 Dallas 199, in which the question before the Court was, as stated by Mr. Justice Chase, "whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October, 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor?" It was held that it did all these, including the destruction of the *personal right* of discharge from debt.

After quoting from the sixth article of the Consti-

tution, which provides "that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding", Mr. Justice Chase proceeds as follows, at page 238:

> "I will now proceed to the consideration of the treaty of 1783. It is evident, on a perusal of it, what were the great and principal objects in view by both parties. There were four on the part of the United States, to wit: 1st. An acknowledgment of their independence by the crown of Great Britain. 2d. A settlement of their western bounds. 3d. The right of fishery. And 4th. The free navigation of the Mississippi. There were three on the part of Great Britain, to wit: 1st. A recovery by British merchants, of the value in sterling money, of debts contracted, by the citizens of America, before the treaty. 2d. Restitution of the confiscated property of real British subjects, and of persons resident in districts in possession of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons. And 3d. A prohibition of all future confiscations and prosecutions. The following facts were of the most public notoriety, at the time when the treaty was made, and therefore, must have been very well known to the gentlemen who assented to it. 1st. That British debts, to a great amount, had been paid into some of the State treasuries, or loan-offices, in paper money of very little value, either under laws confiscating debts, or

under laws authorizing payment of such debts in paper money, and discharging the debtors. 2d. That tender laws had existed in all the States; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed, there was good reason to fear, that similar laws, with the same or less consequences, might be again made (and the fact really happened), and prudence required to guard the British creditor against them. 3d. That in some of the States, property of any kind might be paid, at an appraisement, in discharge of any execution. 4th. That laws were in force in some of the States, at the time of the treaty, which prevented suits by British creditors. 5th. That laws were in force in other of the States, at the time of the treaty, to prevent suits by any person, for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases compelled the receipt of property instead of gold and silver."

and further, at pages 240-241:

"I will examine the 4th article of the treaty in its several parts: and endeavor to affix the plain and natural meaning of each part. To take the 4th article, in order as it stands:

* * * * * * * *

3d. 'Shall meet with no lawful impediment', that is, with no obstacle (or bar) arising from the common law, or acts of Parliament, or acts of Congress, or acts of any of the States, then in existence, or thereafter to be made, that would,

in any manner, operate to prevent the recovery of such debts as the treaty contemplated. A lawful impediment to prevent a recovery of a debt can only be matter of law, pleaded in bar to the action. If the word lawful had been omitted, the impediment would not be confined to matter of law. The prohibition that no lawful impediment shall be interposed is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied by the removal of one impediment, and leaving another; and a fortiori, by taking away the less and leaving the greater. These words have both a retrospective and future aspect.

4th. 'To the recovery', that is, to the right of action, judgment and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea (as in the present case), or by proceedings, after judgment, to compel receipt of paper money or property, instead of sterling money. The word recovery is very comprehensive, and operates in the present case, to give remedy from the commencement of suit, to the receipt of the money.

5th. 'In the full value in sterling money', that is, British creditors shall not be obliged to receive paper money, or property at a valuation, or anything else but the full value of their debts, according to the exchange with Great Britain. This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the State where entered into. This provision has also a future aspect in this particular, namely, that no lawful im-

pediment, no law of any of the States made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in anything but the value in sterling money. The obvious intent of these words was, to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation."

And at page 245:

"It was said, that the defendant ought to be fully indemnified, if the treaty compels him to pay his debts over again; as his rights have been sacrificed for the benefit of the public. *That congress had the power to sacrifice the rights and interests of private citizens, to secure the safety or prosperity of the public, I have no doubt;* but the immutable principles of justice; the public faith of the states that confiscated and received British debts, pledged to the debtors; and the rights of the debtors, violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty, for the benefit of the public. This principle is recognized by the constitution, which declares, 'that private property shall not be taken for public use without just compensation'. See Vattel, lib. 1, c. 20, Sec. 244. Although Virginia is not bound to make compensation to the debtors, yet, it is evident, that they ought to be indemnified, and it is not to be supposed, that those whose duty it may be to make the compensation, will permit the rights of our citizens to be

> sacrificed to a public object, without the fullest indemnity." (Italics ours.)

It may be noted that Austria, in the Treaty of St. Germain, Art. 249 (j), undertook to compensate her nationals for losses suffered by reason of the sale or retention of their property, rights or interests in Allied or Associated States.

In *United States* v. *The Schooner Peggy*, 1 Cranch. 103, this Court construed the provisions of the convention between the United States and France of September 30, 1800 for the mutual restoration of property captured but not "definitively" condemned. The convention having intervened since the judgment below it was held that the Supreme Court was bound to order the restoration without regard to the merits of the judgment. Chief Justice Marshall delivered the opinion of the Court and said at page 110:

> "But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress; and although restoration may be an executive when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.
>
> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes

and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and *if the nation has given up the vested rights of its citizens*, it is not for the court, but for the Government to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." (Italics ours.)

In *United States* v. *Percheman*, 7 Pet. 51, there was involved a construction of the treaty of February 22, 1819, between the United States and Spain, by which Florida was ceded to the United States. The plaintiff claimed certain land lying in this territory by virtue of a grant from a duly accredited Spanish authority in 1815. The eighth clause of the treaty provided in substance that all grants made prior to January, 1818 by the Spanish authorities in the Florida territory "shall be ratified and confirmed to the persons in possession of the land".

It was held (reversing a previous decision to the contrary in 2 Pet. 253) that the treaty provision was self-executing. The court said at page 89:

> "Although the words 'shall be ratified and confirmed' are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that 'they shall be ratified and confirmed' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable."

Also to this effect:

> *Georgia* v. *Brailsford*, 3 Dall. 1;
> *Edye* v. *Robertson* (Head Money Cases) 112 U. S. 580;
> *Hauenstein* v. *Lynham*, 100 U. S. 483;
> *Whitney* v. *Robertson*, 124 U. S. 190.

We submit, and believe that it is self-evident, that the agreement signed at Washington, November 26, 1924 (Treaty Series No. 730), between the United States and Austria and Hungary, for the determination of the amounts to be paid by Austria and by Hungary, in satisfaction of their obligations under the treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921, does not affect rights acquired by plaintiffs and liabilities imposed upon defendants by the Trading With the Enemy Act and the Treaty of Vienna of August 24, 1921. It is obvious that the agreement of November 26, 1924, did not even attempt to deal with substantive rights.

POINT III.

There was a breach on or about August 6, 1919, following demand on defendant bank, if it should be held that an obligation to pay did not exist theretofore.

On August 6, 1919, the plaintiffs cabled the defendant bank as follows:

> "Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen stop if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop this will obviate lawsuit which we otherwise be compelled to institute" (R., 109-110).

The defendant bank failed to understand this cable:

> "as at that time we never thought it possible that the Peace Conference would demand that pre-war balances will have to be settled at the pre-war rate of exchange" (R., 110).

The bank therefore cabled the plaintiffs on August 12, 1919 in reply as follows:

> "Your cable regarding our consent to custodian incomprehensible wire details and reasons and transactions concerned."

We respectfully submit that this cable had the effect of maturing the debt of the defendant bank to the plain-

tiffs *if it should be held that such an obligation to pay did not exist theretofore.*

Counsel for the bank have claimed that the above quoted cable of August 6, 1919, which was held by the District Court to be a demand, did not constitute a proper demand because it demanded more than the District Court subsequently held was due at that time.

However, the case of *Robertson* v. *Miller*, 266 U. S. 243, is direct authority for the proposition that a proper demand may be made for an amount in excess of that actually due. The record in the *Robertson* case shows that the demand made on the defendant, Beer Sondheimer & Company, by the attempted service of a summons and complaint, demanded the sum of $272,824.88, although the Master found that the amount actually due was only $259,597.21. Yet, this Court held that the demand made by the service of such summons and complaint was a proper demand to make the amount due and to start interest running from the date thereof.

The defendant bank refers to this demand as "a mere inquiry". Mere inquiries do not ordinarily end with the statement that "this will obviate law suit which we otherwise be compelled to institute".

POINT IV.

Interest should be allowed both under treaty and aside from treaty upon the indebtedness owing to the plaintiffs by the defendant bank from the due date of the principal amount.

So far as our efforts have disclosed, there are only four decisions of this Court on the question of interest

to be allowed during war upon debts owing by a citizen of one belligerent country to a citizen of another. We summarize their holdings as follows:

(1) Where an action is brought to recover a personal judgment upon a debt from a citizen of one belligerent to a citizen of another which fell due at a time when war was waging in actual hostilities and had not borne interest, by its terms, prior to the time of maturity, interest may not be recovered for the period prior to the cessation of hostilities where the law of the country in which the debtor resides forbids payments of the debt during hostilities and where that country is the country of the forum. *Brown* v. *Hiatts*, 15 Wall. 177.

(2) In the event, however, that upon the falling due of such a debt during the period of war, the enemy creditor has an agent in the country of the debtor to receive payment of the debt, interest will run if the payment is not made. The war is not deemed to terminate the agency established by the enemy creditor for the purpose of receiving payment of the debt. *Ward* v. *Smith*, 7 Wall. 447.

(3) In the event that the enemy debtor has property in the hands of an agent in the country of the creditor even though the agent has no authority to devote it to the payment of the debt, and is under instructions from his principal not to do so, interest will continue to run. *Miller* v. *Robertson*, 266 U. S. 243.

(4) Where the debt became due prior to the inception of a state of war and the suit is to apply to the debt property in the possession of the Alien Property Custodian and formerly belonging to the enemy debtor interest will run during the war regardless of whether the

enemy debtor had an agent in the country of the creditor. *Guinness* v. *Hicks*, 269 U. S. 71.

The English law in this regard is settled.

In *Hugh Stevenson & Sons, Limited* v. *Aktiengesellschaft fur Cartonnagen-Industrie* (1917), 1 K. B. 842, Swinfen Eady, *L.J.*, said at page 850:

> "A debt which by law carries interest, and which is owing to an enemy, does not cease to carry interest by reason of the war, although the enemy cannot enforce payment until the return of peace. If the principal of the debt is not confiscated, why should the interest be confiscated? The learned Judge below said: 'Enemy property in this country is not to be confiscated'; yet the effect of the judgment is to confiscate the interest, as if the defendant had not been an enemy, he would certainly have claimed interest. In *Wolff* v. *Oxholm* (1817), 6 M. & S. 92, the plaintiffs recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war. In like manner interest must run in favor of an enemy during the war, although not then actually payable to him."

This case was decided by the Court of Appeal with one dissenting Lord Justice, and was appealed to the House of Lords, where the decision was unanimously affirmed.

Hugh Stevenson & Sons v. *Aktiengesellschaft fur Cartonnagen-Industrie* (1918), A. C. 239, by Lord Chancellor Findlay, at page 245:

> "This appears to me to follow from the principle that the property of an enemy is not con-

fiscated though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest, no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited, *Hoare* v. *Allen,* 2 Dall. 102, and *Brown* v. *Hiatts,* 15 Wall. 177, the latter a decision of the Supreme Court of the United States.

These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the courts of this country, does not appear to have formed the subject of any express decisions in England. The judgment of Lord Ellenborough, however, in *Wolff* v. *Oxholm,* 6 M. & S. 92, appears to me to imply that, in the view of Lord Ellenborough, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected."

The plaintiffs here contend that the *Hiatts* and *Ward* cases are easily distinguishable from the instant case and that the instant case falls squarely within the rulings of this Court and of the highest court of England as rendered in *Miller* v. *Robertson; Guinness* v. *Hicks,* and *Stevenson* v. *Aktiengesellschaft, supra.*

In *Brown* v. *Hiatts* the action was brought to recover a personal judgment whereas in the instant case a judgment *in rem* is sought. There the debt had not borne interest by its terms prior to the time of maturity. Here

the debt had borne interest. There the law of the country in which the debtor resided forbade payment of the debt during hostilities and that country was the country of the forum. Here there was no Austrian law or decree forbidding payment, and Austria is not the country of the forum. In the *Brown* case the Court was not giving effect to a confederate statute or decree but was a Court of the United States enforcing a law of the United States with regard to a debtor who resided within the United States. The "interdiction" there mentioned was that of a law of the country of the forum and of the residence of the defendant.

Concerning *Ward* v. *Smith* the record does not show that the plaintiffs had an agent in the country of the debtor capable of receiving payment of the debt. This fact merely makes the *Ward* case unavailable to plaintiffs here.

In *Miller* v. *Robertson, supra,* the Court said:

> "It would be unjust and inconsistent with the remedial purposes of Section 9 to hold that the seized enemy property cannot be held for the full amount of the seller's loss, and that, to the extent of interest during the period of the war compensation must be denied. The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war cannot be sustained."

Also:

> "While the suit * * * is one against the United States the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity of liability for interest * * * does not apply."

And the Court said in the course of its opinion, before stating the rule first quoted above, the following:

> "One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity interest is allowed on money due. * * *"

It seems to us that this Court in the *Robertson* case intended to and did express the sound rule in this regard on principle and in general terms. However, if the significance of the decision in that case is restricted to the actual facts plaintiffs still contend that the instant case falls squarely within the ruling of the *Robertson* case because the debtor bank had property in the hands of an agent in this country which agent was capable of discharging the debt. Mr. Von Fest was the agent of the Wiener Bank-Verein in this country. He had full power to act for the bank, and he had in his control property from which he could have paid the debt here (R., p. 103).

Plaintiffs furthermore submit that the provisions of sub-section 8 (a) of the Trading With the Enemy Act make the Alien Property Custodian in matters of this nature the agent of the "enemy" in that notice to the Custodian is sufficient to terminate or mature a contract such as the one in the instant case. Certainly also the Custodian had in his hands property belonging to the defendant bank.

The *Guinness* case is also direct authority for plaintiffs' contention. For in this connection Mr. Justice Holmes, speaking for this Court, said:

> "The denial of interest for the time covered by the war seems to us wrong.

The cause of action had accrued before the war began, *Young* v. *Godbe*, 15 Wall. 562, 21 L. Ed. 250, and after it had accrued the question was no longer one of excuse for not performing a contract but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interest have led to a diversity of decisions but here again what we regard as principle has prevailed in later days. *Miller* v. *Robertson*, 266 U. S. 243, 69 L. Ed. 265, 45 Sup. Ct. Rep. 73; *Hugh Stevenson & Sons* v. *Aktiengesellschaft fur Cartonnagen-Industrie* (1918), A. C. 239, 245, Ann. Cas. 1918 D, 575-H. L., s. c. (1917) 1 K. B. 842, 850, 7 B. R. C. 600-C. A. The case of *Brown* v. *Hiatt*, 15 Wall. 177, 21 L. Ed. 128, although criticised in the last cited decision, is consistent on its facts with the principle adopted here, since war existed at the time when the cause of action otherwise would have accrued, and it very possibly might be held that war excuses the performance of a contract although it does not impair or diminish a liability already fixed by law."

The proceeding here, in the matter of interest, is just as much *in rem* as is the proceeding for the principal amount. The plea of the defendant bank, of its per-

sonal inability to pay interest by reason of the war, is not, we submit, any more or any less effective with regard to interest than it would be with regard to principal. Both transactions would involve payments of money and if the bank's contention has any force or effect in this Court it must affect both payments of principal and of interest. The principal involved has been in the hands of the Alien Property Custodian since it was taken over during the war and has earned interest. It is common knowledge that claims allowed by the Alien Property Custodian and the Department of Justice are allowed with interest. The defendant bank had the use of the plaintiffs' money in Vienna from April 6, 1917. The money was Austrian currency, which was capable of current use by the bank and no doubt was so used. The plaintiffs, on the other hand, were deprived of all use or control over the funds in question, and it is for this use that the plaintiffs now ask interest. We submit that while interest may be assessed as damages in the sense that it is added to a judgment which is in damages for breach of contract, the essential nature of interest is money paid for the use of money. That, of course, is the reason why in banking transactions it is only paid on accounts which are general and which are in money which is current in the place where it is situated.

We consequently submit that the instant case in the matter of interest is easily distinguished from the case of *Brown* v. *Hiatts* and that of *Ward* v. *Smith,* and falls squarely within the two other decisions of this Court in that regard, that is *Miller* v. *Robertson* and *Guinness* v. *Hicks,* and within the rule as stated by the English House of Lords in *Stevenson* v. *Aktiengesellschaft.*

The liability of the defendants for interest under the Treaty of Vienna, incorporating provisions of the Treaty

of St. Germain, has already been discussed in Sub-point II B, *supra*.

POINT V.

The deposit of depreciated kronen by the defendant bank with an Austrian court did not discharge the bank of its obligation to plaintiffs.

In its first defense, which is the only one relied on, the defendant bank alleges that the deposit of kronen sued for by plaintiffs was made pursuant to an agreement and understanding that the mutual rights and obligations arising between plaintiffs and defendant bank should be governed by the laws of Austria; that at the time of said agreement and at all subsequent times the General Civil Law of Austria provided by Section 1425 as follows:

> "If a debt cannot be paid because the creditor is unknown, absent, or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor";

that after July 14, 1919, and prior to April 1st, 1920, plaintiffs refused to accept the kronen on general deposit with defendant bank as offered, either in kronen or in United States currency, at the rate of exchange between the United States dollars and Austrian kronen then

prevailing, but demanded the amount of said kronen on deposit as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of war between the United States and Austria-Hungary, namely, 11.18 United States cents for each Austrian krone; that on or about April 1, 1920, the defendant bank deposited the number of kronen in its bank stated to be due and owing to the plaintiffs as of April 6, 1917, in the proper Court at Vienna and gave notice of such deposit to plaintiffs, and thereby became released in this cause of action.

We contend that if such a contract was so made between plaintiffs and defendant bank, it was absolutely terminated and dissolved by the inception of a state of war, by the international rule of non-intercourse between alien enemies, and by the prohibitory provisions of the Trading With the Enemy Act, as is set forth at length in Point II of this brief. We furthermore contend that the Austrian law and any act done under it must be ineffective and unavailing in view of the provisions of the Joint Resolution of Congress of July 2, 1921, and of the Treaty of Vienna, concluded between the United States and Austria, August 24, 1921, as is also set forth in Point II hereof.

This is not an action in the nature of a replevin action to recover property, title to which remained in plaintiffs. It is not a suit for performance of a contract, which suit might invoke Austrian law either under contract or as *lex loci solutionis*. Nor is the deposit of kronen in court by the defendant any part of the performance of the contract, even as stated by that bank.

On the contrary, it is a suit for breach of the obligation to pay 2,063,799 kronen. It is a suit brought by citizens and residents of the United States under a statute passed by reason of the existence of a state of war between the United States and Germany, when Austria was an "ally of enemy", to collect, at a pre-war rate of exchange, from property formerly belonging to the Wiener Bank-Verein and taken over by the Alien Property Custodian, a debt owing to the plaintiffs by the defendant bank in kronen. In providing through the Trading With the Enemy Act for the taking over of property of "enemies" and "allies of enemy", and, as a practical matter, thus depriving American citizens of their remedies through attachment or satisfaction of judgment, Congress within its power and authority as defined by the Constitution, provided for the recovery by American citizens, from property seized by the Alien Property Custodian, of claims which such citizens might have against "enemy" and "ally of enemy" subjects.

In so doing it divided possible claims into two general categories, the first of which comprises property rights and interests, and the second of which comprises debts. In Point I of this brief we have shown that this Court has held that the Trading With the Enemy Act and the word "debts" therein are to be liberally construed.

In this brief we have contended that the kronen here owed are payable at a pre-war rate of exchange under the Trading With the Enemy Act whether or not they were due. In addition, we have contended that, if it should not be so held, this debt was payable at a pre-war rate of exchange by reason of an account stated and a demand, and because the state of war, the inter-

national rule of non-intercourse between alien enemies, and the provisions of the Trading With the Enemy Act terminated the contract. We have also contended that regardless of these factors, the debt is clearly payable at a pre-war rate of exchange by reason of the Treaty of Vienna, entered into between the United States and Austria on August 24, 1921.

We consequently submit that the cause of action matured and crystalized in dollars under American law, and attached to property in this country, long before the deposit of kronen on April 1, 1920, and that, in these circumstances, the Austrian law relative to any deposit of kronen can have no significance.

As evidence that the defendant bank realized the soundness of this position even when it made its deposit of kronen, we quote the following sentence from the letter, dated April 1, 1920, from the defendant bank to the plaintiffs (Plaintiffs' Exhibit 1, R. 108, 110):

> "We never thought it possible that the Peace Conference would demand that pre-war balances will have to be settled at the pre-war rate of exchange."

Even if the Austrian law pleaded by the defendant bank might be considered, in ordinary circumstances, to discharge that bank of any liability beyond the subject matter of the deposit, we insist that it cannot have such an effect here, because to do so would clearly render nugatory the provisions of the Treaty of Peace between the United States and Austria, known as the Treaty of Vienna, which became the law of Austria, as well as of the United States, and superseded any national law inconsistent therewith.

There have been other cases where in similar circumstances it was pleaded that debts were satisfied by payments by defendants into designated depositories in depreciated currency under statutes authorizing payment of such debts in depreciated money and discharging the debtors, and where a treaty superseded the statutes and rendered them and payments made thereunder ineffective and nugatory.

The leading case in this country is *Ware* v. *Hylton*, 3 Dall. 199, which has been mentioned heretofore. It is, however, a case dealing with a situation so similar to the present one that we take the liberty of again stating it. During the Revolutionary War, British debts to a great amount had been paid into loan offices "in paper money of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money, and discharging the debtors" (p. 238). A statute of Virginia passed on October 20, 1777, was one of such laws. The question before the Court was, as stated by Mr. Justice Chase, page 234:

> "Whether the fourth article of the said Treaty (United States and Great Britain—September 3, 1783) nullifies the law of Virginia passed on the 20th of October, 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof against the original debtor?"

Consequently, in that case a question was presented which was almost identical with that which is now before this Court. In fact, the situation from the point of view of the remedial aspects of the Treaty was certainly more difficult then than it is now, for the British debts had very largely been paid into loan offices and

state treasuries in paper money of depreciated value, under express provisions of law applicable to those specific debts, that such payments constituted a full discharge to the debtors. The language of Article IV of the Treaty in question was: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." This Court held that, with no enabling act to aid the Treaty in its execution, the language of the above quoted article *nullified* a state law providing that debts owing from American citizens to British subjects were discharged by payment into state "loan offices"; *destroyed* the payment made under it; *revived* the original debt; and *gave a right of recovery thereof* against the original debtor. We submit that this case, which has been followed many times, is controlling here.

In the British leading case of *Wolff, et al.* v. *Oxholm* (1817), 6 Maule & Selwyn 92, it was held that it is no defense to an action for debt brought against an alien enemy that he has paid the debt into the treasury of his own country under an ordinance confiscating debts due to enemy subjects. Lord Ellenborough, *C. J.*, said, in the course of his opinion:

> "And this brings us to the consideration of what is the material question in the cause, viz., the legal effect of the Danish ordinance of confiscation promulgated on the 16th of August, 1807, and the facts that took place after it, which constituted the main ground of the defense. * * * We think our judgment would be pregnant of mischief to future times if we did not declare that in our opinion this ordinance and the pay-

ment to the commissioners appointed under it do not furnish a defense to the present action."

POINT VI.

Analysis of the equities.

At first glance it may appear inequitable for the plaintiffs herein to seek to recover at a pre-war rate of exchange monies owing by an Austrian bank in kronen. We respectfully submit, however, that such is not the case. The kronen which are being sued for in this case were bought by the plaintiffs, with American dollars, at a pre-war rate of exchange and left on deposit with the defendant bank in order that they might be available for exchange transactions in which the plaintiffs were engaged. Prior to the entry of the United States into the war, plaintiffs attempted, as did many other financial houses, to exhaust their deposits of kronen in order that they might not have property in enemy countries in the event that a state of war arose. The usual custom then in making a foreign exchange transaction was to cable the foreign bank to pay a certain sum to a certain person, and following this custom plaintiffs sent to the telegraph companies cable messages which would have materially reduced the amounts of deposit in enemy countries, if they had been transmitted, and the instructions therein followed. However, in almost all, if not every instance, these cables failed in transmission through no fault of the plaintiffs, with the result that when the United States entered the war and communication was cut off with Austria because it was an ally of enemy and later an enemy country, these deposits had been reduced little, if any, in amount.

As time progressed after the entry of the United States into the war, it was apparent that if the recoveries of kronen deposits with Austrian banks could only be made at a post-war rate of exchange, the American creditors, having bought these kronen at a pre-war rate, would suffer tremendous losses. This situation was further aggravated by the institution of suits against the American creditors by depositors in this country to recover from such creditors the dollars which the depositors had delivered to the creditors for transmission of the equivalent in marks or kronen to Germany or Austria and by the almost uniform decisions of the courts in these suits in favor of the plaintiff depositors and against the creditors of the "enemy" banks (*e. g., Gravenhorst* v. *Zimmermann,* 236 N. Y. 22; *Atlantic Communication* v. *Zimmermann,* 182 App. Div. 862). After the end of the war it became apparent that the courts of this country were going to hold the creditor banks here responsible for a repayment of the dollars and that if the banks could not recover their marks and kronen on deposit in Germany and Austria at a pre-war rate of exchange, but only at a post-war rate they would be forced, through no fault of their own, to take a loss which, today, amounts to more than $999,930 on each $1,000,000 invested in kronen.

When the Treaty of Versailles and the Treaty of St. Germain were negotiated it was apparent that marks and kronen had already fallen tremendously and that if they did not go lower it would probably be a very long time before they recovered to any appreciable extent. It was also foreseen that there were many instances, such as claims of this nature reveal, where, if the recovery of a debt owed in enemy currency by an enemy national to an allied or associated national, could only be made at a

rate of exchange prevailing at the time of the recovery, nationals of the allied or associated powers would be taking tremendous losses through no fault of theirs. In these circumstances, the framers of the Treaty of St. Germain inserted in that Treaty the provisions set forth in Point II of this brief making the property of Austrian debtors in the United States chargeable for these debts in the currency of the United States at a pre-war rate of exchange and recoverable in accordance with the laws of the United States, and then, in order to remove this loss and burden from the individual debtors, the Austrian Government undertook "to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States" (Treaty of St. Germain, Article 249, Section (j)).

Having examined the situation with regard to the American creditors, it will be helpful to consider the practical situation from the viewpoint of the Austrian debtors in the event that debts of this nature are decreed to be payable in dollars at a pre-war rate of exchange from property in the possession of the Alien Property Custodian and formerly belonging to "enemy" debtors.

If satisfaction of these debts is decreed out of the individual trusts in the names of the Austrian debtors, no loss will be incurred by those debtors, because the property, either dollars or otherwise, standing in those trusts and so used was purchased by the debtors at a pre-war rate of exchange and is used to satisfy debts also at a pre-war rate. The situation, consequently, would be exactly the same as though those debtors had paid American creditors at a pre-war rate of exchange, then recovered their property from the Custodian and converted it into kronen or the equivalent thereof at a post-war rate of exchange. In fact, where the property

so used was purchased at a par rate of exchange of 20 cents per krone, or nearly so, the debtor banks would actually make on that transaction, because it would be used to satisfy debts at a rate of exchange of approximately 11 cents for each Austrian krone. For example, property valued at $100,000 and which cost the Austrian debtors 500,000 kronen would be used to extinguish a debt of 909,090 kronen at a March, 1917, rate. In other words, no loss will fall upon the Austrian debtors or any Austrian nationals; and, with respect to any property which is not so used and consequently returned, the Austrian nationals will make more than $999,930 on each $1,000,000 at the present stabilized rate of exchange at which 1,000,000 kronen are worth $14.12½ American. The Austrian krone now is out of circulation in Austria and is no longer currency there. It has been replaced by the Austrian shilling, worth 14⅛ cents American.

The utmost that can be said on behalf of the Austrian nationals, no matter what method of actual payment at a pre-war rate is employed, is that they may be deprived of any opportunity to take advantage of the present rate of exchange and recover 17,857,000,000 kronen from an investment which cost in 1916 or 1917 at the most 2,000,000 kronen, or, to put the matter in another form, the utmost that can be said on behalf of the Wiener Bank-Verein is that if the debt to the plaintiffs is paid at a pre-war rate of exchange it will merely be deprived of *some* of the enormous profits which have ensued by reason of the fact that its property in the United States was taken over by the Alien Property Custodian, acting for the United States Government and as a common law trustee, and was preserved in a currency which after the war had not only a high exchange value but a high purchasing value as well.

As explained above, the plaintiffs are faced today with an actual loss of over $999,930 on every $1,000,000 used to purchase kronen on deposit in Austria, and the Wiener Bank-Verein is faced with no loss if its debts are paid at a pre-war rate of exchange from seized property, thus taking the burden from the American creditors. At most, the Wiener Bank-Verein would be prevented from enormously profiting by the war, and it is respectfully submitted that, under no principle of equity, is it just and fair to force American creditors to accept these debts in kronen at a post-war rate of exchange, losing more than $999,930 on each $1,000,000 investment made in the regular course of their business to facilitate American commercial activities, and, at the same time, when all claims against the property of the Wiener Bank-Verein are terminated by such payments in depreciated currency, to allow that bank to recover its property and make, by reason of the war, more than $999,930 on every $1,000,000 or, translating it into kronen, to take a clear profit of over 17,855,000,000 kronen on every 2,000,000 kronen invested.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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February, 1927.